TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 268.

S. H. H. CLARK, OLIVER W. MINK, E. ELLERY ANDERSON, J. W. DOANE, AND F. R. COUDERT, AS RECEIVERS OF THE UNION PACIFIC RAILWAY COMPANY, PLAINTIFFS IN ERROR,

vs.

THE CITY OF KANSAS CITY, KANSAS; THE BOARD OF EDUCATION OF THE CITY OF KANSAS CITY, KANSAS, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED APRIL 21, 1899.

(17,375.)

(17,375.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 790.

S. H. H. CLARK, OLIVER W. MINK, E. ELLERY ANDERSON, J. W. DOANE, AND F. R. COUDERT, AS RECEIVERS OF THE UNION PACIFIC RAILWAY COMPANY, PLAINTIFFS IN ERROR,

vs.

THE CITY OF KANSAS CITY, KANSAS; THE BOARD OF EDUCATION OF THE CITY OF KANSAS CITY, KANSAS, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

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1 In the Supreme Court of the State of Kansas.

S. H. H. CLARK ET AL., Receivers, etc., Plaintiffs in Error,
vs.
THE CITY OF KANSAS CITY, KANSAS, ET AL., Defendants in Error. } No. 11392.

Be it remembered that on the 22nd day of February, 1899, there was filed in the office of the clerk of the supreme court of the State of Kansas a petition in error, together with a precipe for a summons in error attached thereto, and also with a transcript of the record of the court of common pleas of Wyandotte county, Kansas, thereto attached and made a part thereof, all of which, with the endorsements thereon, is in the words and figures as follows, to wit:

2 11392. S. H. H. Clark *et al.*, plaintiffs in error, *vs.* The City of Kansas City *et al.*, defendants in error. Petition in error and case-made. Filed Feb. 22, 1899. Jno. Martin, clerk supreme court.

3 Filed Feb. 22, 1899. Jno. Martin, Clerk Supreme Court.

11392.

In the Supreme Court of the State of Kansas.

S. H. H. CLARK, OLIVER W. MINK, E. ELLERY ANDERSON, J. W. Doane, and F. R. Coudert, as Receivers of the Union Pacific Railway Company, Plaintiffs in Error,
vs.
THE CITY OF KANSAS CITY, KANSAS; BOARD OF EDUCATION OF the City of Kansas City, Kansas; Township of Wyandotte of Wyandotte County, Kansas; School District No. 9 of Wyandotte County, Kansas; Benjamin Schnierle, as County Treasurer of Wyandotte County, Kansas; Leonard C. Daniels, as Successor in Office of Charles E. Bruce and as County Clerk of Wyandotte County, Kansas, Defendants in Error.

Petition in Error.

The said plaintiffs in error complain of the said defendants in error for that certain of the defendants in error, at the February, 1899, term of the court of common pleas of Wyandotte county, Kansas, recovered judgment by the consideration of said court against the plaintiffs in error in a certain action then pending in said court, wherein the above-named plaintiffs in error were plaintiffs and the above-named defendants in error were defendants, a copy of the record of the judgment and proceedings in which case, duly certified, is hereto attached, marked Exhibit "A," and made a part of this petition in error; and the said plaintiffs in error allege that there is error in the said record and proceedings in this, to wit:

I.

That the said court erred in setting aside the judgment rendered in said cause upon the 3rd day of July, 1895, in favor of the plaintiffs.

II.

That the court erred in sustaining the demurrer to plaintiffs' petition.

III.

That the court erred in rendering judgment against the plaintiffs.

4 IV.

That the court erred in refusing to enjoin the county treasurer of Wyandotte county, Kansas, from collecting the taxes of the defendant- City of Kansas City, Kansas, and The Board of Education of the City of Kansas City, Kansas, levied against the property of the Union Pacific Railway Company described in plaintiffs' petition.

V.

That the court erred in refusing to enjoin the county clerk of Wyandotte county, Kansas, from entering upon the tax-rolls of said county the levies of the city of Kansas City, Kansas, and of the board of education of the city of Kansas City, Kansas, against the property of the Union Pacific Railway Company described in plaintiffs' petition.

VI.

That the court erred in enjoining the collection of the taxes of Wyandotte township and of school district number nine levied against the property of the Union Pacific Railway Company described in plaintiffs' petition.

VII.

That the court erred in enjoining the extension of the levies of Wyandotte township and of school district number nine against the property of the Union Pacific Railway Company described in plaintiffs' petition.

VIII.

That the court erred in holding that the property of the Union Pacific Railway Company described in plaintiffs' petition was within the limits of the city of Kansas City, Kansas, and subject to the levies of said city and of the board of education of said city.

IX.

That the court erred in holding that the property of the Union Pacific Railway Company described in plaintiffs' petition was not within the limits of Wyandotte township and not subject to the levies of said township and of school district number nine.

5 X.

That the court erred in failing and refusing to hold that chapter 74 of the Session Laws of Kansas for 1891, being an act entitled "An act relating to certain cities of the first class and the adding thereto certain adjoining territory," was in violation of that part of the fourteenth amendment to the Federal Constitution which reads as follows: "Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

XI.

That the court erred in refusing to hold that the exception contained in chapter 74 of the Session Laws of Kansas for 1891, being an act entitled "An act relating to certain cities of the first class and the adding thereto certain adjoining territory," did not bring said act within the inhibition of that part of the fourteenth amendment to the Federal Constitution which reads as follows: "Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," the exception in said statute herein referred to being as follows: "But nothing in this act shall be taken or held to apply to any tract or tracts of land used for agricultural purposes when the same is not owned by any railroad or other corporation."

XII.

That the court — in holding that said chapter 74 of the Session Laws of Kansas for 1891, being an act entitled "An act relating to certain cities of the first class and the adding thereto certain adjoining territory," was and is valid in so far as plaintiffs in error are concerned and binding upon them.

XIII.

That the court erred in holding that the action of the city
6 of Kansas City in taking within its limits the property of the Union Pacific Railway Company, described in plaintiffs' petition, under the provisions of chapter 74 of the Session Laws of Kansas for 1891, being an act entitled "An act relating to certain cities of the first class and the adding thereto certain adjoining territory," was legal, and that the tax levies of said city and of the board of education of said city extended against said property were valid.

Wherefore said plaintiffs in error pray that the judgment of said court rendered upon the 20th day of February, 1899, may be reversed and set aside, and that the judgment rendered herein upon the 13th day of July, 1896, in favor of plaintiffs may be restored in full force and effect. Plaintiffs pray for any further or other or

additional relief to which they may be entitled and as to the court may seem just and proper.

A. L. WILLIAMS,
N. H. LOOMIS, &
R. W. BLAIR,
Attorneys for Plaintiffs in Error.

7 In the Supreme Court of the State of Kansas.

S. H. H. CLARK ET AL., Receivers of the Union Pacific Railway Company, Plaintiffs in Error,
vs.
THE CITY OF KANSAS CITY, KANSAS, ET AL., Defendants in Error.

Præcipe for Summons in Error.

To the clerk of said court:

Please issue summons in error in the above-entitled cause, directed to the sheriff of Wyandotte county, Kansas. It may be served upon T. A. Pollock or F. D. Hutchings, attorneys of record for the following-named defendants in error:

The City of Kansas City, Kansas; The Board of Education of the City of Kansas City, Kansas; Benjamin Schnierle, as county treasurer of Wyandotte county, Kansas, and Leonard C. Daniels, as county clerk of Wyandotte county, Kansas.

It should also be served upon E. A. Enright, as attorney of record for the township of Wyandotte, Wyandotte county, Kansas, and school district number nine of Wyandotte county, Kansas.

A. L. WILLIAMS,
N. H. LOOMIS, &
R. A. BLAIR,
Attorneys for Plaintiffs in Error.

8 In the Court of Common Pleas of Wyandotte County, State of Kansas.

S. H. CLARK ET AL., Receivers of the Union Pacific Railway Company, Plaintiffs,
vs.
THE CITY OF KANSAS CITY, KANSAS, ET AL., Defendants.

Transcript of Record.

EXHIBIT "A."

9 Be it remembered that on the 15th day of December, A. D. 1893, the plaintiffs filed with the clerk of said court of common pleas of Wyandotte county, State of Kansas, their petition herein, a copy of which petition being in words and figures as follows:

10 In the Court of Common Pleas of Wyandotte County, Kansas.

S. H. H. CLARK, OLIVER W. MINK, E. ELLERY ANDERSON, J. W. Doane, and F. R. Coudert, as Receivers of the Union Pacific Railway Company, Plaintiffs,

vs.

THE CITY OF KANSAS CITY, KANSAS; THE BOARD OF EDUCATION of the City of Kansas City, Kansas; M. G. McLean, as County Treasurer of Wyandotte County, Kansas; Charles E. Bruce, as County Clerk of Wyandotte County, Kansas; The Township of Wyandotte, Wyandotte County, Kansas, and School District No. Nine of Wyandotte County, Kansas, Defendants.

Petition.

The plaintiffs for their cause of action allege that on the 13th day of October, 1893, plaintiffs above named, S. H. H. Clark, Oliver W. Mink, and E. Ellery Anderson, were by the United States circuit court for the district of Nebraska appointed receivers of all the property of the Union Pacific Railway Company; that afterwards, on the 13th day of October, 1893, they were by the United States circuit court for the district of Kansas appointed ancillary receivers of the property of the Union Pacific Railway Company and given entire charge, custody, and control of all of the property of said company within the State of Kansas; that afterwards, on the — day of November, 1893, plaintiffs J. W. Doane and F. R. Coudert were by the United States circuit court for the district of Nebraska appointed as additional receivers of all the property of the Union Pacific Railway Company; that afterwards, on the 27th day of November, 1893, they were by the United States circuit court for the district of Kansas duly appointed as ancillary receivers of the property of said company, and that said plaintiffs above named have since said date had full charge, custody, and control of all of the property of all kinds and description of the Union Pacific Railway Company; that under the order of appointment as receivers they are now engaged in operating the railroad of the Union Pacific Railway Company, and that under such order of appointment they are authorized to and it is the duty of plaintiffs to pay all

11 legal taxes against the property of the Union Pacific Railway Company and to institute and prosecute all such suits as may be necessary for the proper protection of the property and trusts vested in them as receivers.

Plaintiffs further allege that said The Union Pacific Railway Company is a corporation duly organized in accordance to law and is the owner of a line of railroad and other property located in Wyandotte county, Kansas.

That the said city of Kansas City, Kansas, is a city of the first class organized and existing under and by virtue of the laws of the State of Kansas.

Plaintiffs further allege that on the 8th day of March, 1892, the

said defendants, The City of Kansas City, by a certain ordinance enacted by it upon that date, attempted to include within its boundaries and to bring within its jurisdiction certain unplatted lands lying adjacent thereto and described as follows:

Commencing at the northeast corner of the southeast quarter (¼) of section fifteen (15), township eleven (11), range twenty-five (25) east, in Wyandotte county, Kansas, thence south forty (40) poles; thence east to the Kansas river; thence down the same to the prolongation of the east and west center line of said section fifteen (15); thence west to beginning.

Also commencing at the northeast corner of the southeast quarter of section fifteen (15), township eleven (11), range twenty-five (25) east, in Wyandotte county, Kansas, thence west to the center line of said section fifteen (15); thence north eighty (80) poles; thence west fifty-seven (57) poles; thence south to the southerly line of Fifth street, in the original town site of Armstrong; thence along the southerly line of Fifth street to its intersection with the southerly line of the Muncie boulevard; thence westerly along the southerly line of the Muncie boulevard to the west line of said section
12 fifteen (15); thence south to the southwest corner of the southwest quarter (¼) of section fifteen (15); thence east eighty (80) poles; thence north fifty-two (52) poles; thence east eighty-five (85) poles; thence north twenty eight (28) poles; thence east eight (8) poles; thence north one hundred ninety-nine (199) feet; thence east three hundred fifty-five and eight-tenths (355.8) feet to the east line of Third street, in McAlpine's addition; thence north one hundred sixty (160) feet; thence east two hundred seventy-five (275) feet to the center line of Second street, in McAlpine's addition, produced; thence north one hundred thirty (130) feet; thence east three hundred fifteen (315) feet to the prolongation *to* the center line of First street, in McAlpine's addition; thence north one hundred thirty-two and eight-tenths (132.8) feet; thence east to the east line of said section fifteen (15); thence north forty (40) poles to beginning.

Also commencing at a point where the northerly line of the Union Pacific Railway Company's right of way intersects the east line of section sixteen (16), township eleven (11), range twenty-five (25) east, in Wyandotte county, Kansas, thence northwesterly along said northerly line of the right of way of the Union Pacific railway to the west line of said section sixteen (16); thence south along the west line of said section sixteen (16) about one hundred (100) feet to the southerly line of the right of way of the Union Pacific railway; thence southeasterly along the southerly line of said right of
— the Union Pacific railway; thence southeasterly along the southerly line of said right of way to the east line of said section sixteen (16); thence north about one hundred (100) feet to beginning.

Plaintiffs further allege that said Union Pacific Railway Company was at that time and now is the owner of the lands intended to be described in said ordinance, with the exception of a small portion thereof, consisting of about eight (8) or ten (10) acres, belonging to the Chicago, Rock Island & Pacific Railroad Company.

13 A copy of the ordinance above referred to is attached to this petition, marked Exhibit "A," and made a part hereof.

Plaintiffs allege that said city of Kansas City passed said ordinance and attempted to take said lands within its limits under and by virtue of the provisions of chapter 74 of the Session Laws of Kansas for 1891, being an act entitled "An act relating to certain cities of the first class, and the adding thereto certain adjoining territory;" and plaintiffs are advised, and so charge the fact to be, that in so far as said statute attempts to authorize the taking of said lands within the limits of Kansas City, Kansas, as attempted in said ordinance, "Exhibit A," it is unconstitutional, null, and void, in this, to wit: That by reason of that portion of the act which excepts from its operation any tract or tracts of land used for agricultural purposes when the same is not owned by any railroad or other corporation it is in violation of that part of the fourteenth amendment to the Constitution of the United States which reads as follows: "Nor shall any State deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction *of* the equal protection of the law;" and, furthermore, that by reason of said exceptions and by reason of the facts set forth in this petition said act is a violation of section one (1) of article twelve (12) and of section seventeen (17) of article two (2) of the constitution of the State of Kansas.

Plaintiffs are further advised, and so charge the fact to be, that said city of Kansas City was without authority of law to include within its boundaries the land above described, as attempted by it; that the action of said city in so doing was null and void, and that said land is not and never has been within the limits of said city.

Plaintiffs further allege upon information and belief that there was not at the time of the passage of said chapter 74 of the
14 Session Laws of Kansas for 1891 any city of thirty thousand (30,000) inhabitants or more in the State of Kansas where the conditions referred to in the first part of the said act permitting the adding of additional territory to a city by the passage of an ordinance merely exist; and plaintiffs are advised, and so charge the fact to be, that said act of the legislature, while purporting to be a general act, was intended solely to apply to the lands attempted to be taken within the limits of said Kansas City, Kansas, by said ordinance, "Exhibit A."

Plaintiffs further allege that no notice, either personal or by publication or otherwise, was ever given to said railway company of the intention of said city to enact the ordinance in question or to take the territory in question into the said city, and that said railway company had no opportunity to be heard before the council of said city upon the subject-matter of said ordinance or to protest against the passage of said ordinance.

Plaintiffs further allege that the lands so attempted to be taken within the boundaries of said city, as aforesaid, and owned by the said Union Pacific Railway Company, except that portion thereof used for railroad purposes and assessed by the State board of rail-

road assessors, appear upon the tax-rolls of said county of Wyandotte, now in the hands of the county treasurer thereof, under the following descriptions, and are assessed for the year 1893 at the following values, which valuations appear upon said tax-rolls:

Description No. 1.—All that portion of the east thirty (30) acres of northwest quarter (¼) of section fifteen (15), township eleven (11), range twenty-five (25), being seventeen and $\frac{20}{100}$ (17.20) acres, lying west of and adjacent to county road (Fifth street), running through said tract of land from north to south. Valuation, $11,465.00.

Description No. 4.—Commencing at a point seven hundred fifty-three (753) feet north of the southeast corner of the southwest
15 quarter (¼) of the southwest quarter (¼) of section fifteen (15), township eleven (11), range twenty-five (25), said point being fifty (50) feet north of center line of Kansas City and Topeka railway, thence west fifty (50) feet from and parallel to said center line of said railway to west line of said section fifteen (15), township eleven (11), range twenty-five (25); thence north along west line of said section fifteen (15) to a point fifty (50) feet south of center line of most southerly track of Union Pacific Railway Company, measured at right angle- thereto; thence easterly fifty (50) feet from and parallel to said center line of said track to east line of southwest quarter (¼) of southwest quarter (¼) of section fifteen (15), township eleven (11), range twenty-five (25); thence south on said west line to beginning, being three and eighty-five-hundredths (3.85) acres. Valuation, $3,830.00.

Description No. 5.—Commencing at a point which is three hundred seventy and $\frac{52}{100}$ (370.52) feet north and thirty-five (35) feet west from southeast corner of southwest quarter (¼) of southwest quarter (¼) of section fifteen (15), township eleven (11), range twenty-five (25), thence westerly three hundred thirty-two and $\frac{48}{100}$ (332.48) feet south from and parallel to center line of main track of Kansas City and Topeka railway to west line of section fifteen (15), township eleven (11), range twenty-five (25); thence south on said west line of said section fifteen (15), township eleven (11), range twenty-ve (25), to southwest corner thereof; thence east on south line of section fifteen (15), township eleven (11), range twenty-five (25), thirteen hundred five and $\frac{4}{10}$ (1,305.4) feet to a point thirty-five (35) feet west from the southeast corner of southwest quarter (¼) of southwest quarter (¼) of section fifteen (15), township eleven (11), range twenty-five (25); thence north three hundred seventy and $\frac{52}{100}$ (370.52) feet to beginning, being thirteen and $\frac{85}{100}$ (13.85) acres. Valuation, $9,250.00.

16 Description No. 6.—Commencing at a point fifty (50) feet south of center of track of Union Pacific railway, measured at right angles thereto, which point is eight (8) poles east and forty (40) poles south of northeast corner of southwest quarter (¼) of section fifteen (15), township eleven (11), range twenty-five (25), thence westerly fifty (50) feet south and parallel to said center line of track to east line of county road running through said tract of land from north to south; thence southerly along east line of said county road to east line of southwest quarter (¼) of southwest quarter (¼) of section

fifteen (15), township eleven (11), range twenty-five (25); thence south on said east line to a point fifty-two (52) poles north of southeast corner of southwest quarter (¼) of southwest quarter (¼) of section fifteen (15), township eleven (11), range twenty-five (25); thence east eighty-five (85) poles to east line of southwest quarter (¼) of section fifteen (15), township eleven (11), range twenty-five (25); thence north on said east line twenty-eight (28) poles; thence east eight (8) poles; thence north forty (40) poles to beginning, excepting right of way one hundred (100) feet wide, fifty (50) feet on each side of center line of Union Pacific tracks as located through said lands, being twenty-five (25) acres. Valuation, $22,500.00.

Description No. 7.—Commencing at a point six hundred fifty-nine and six-tenths (659.6) feet south of a point on north line of southeast quarter (¼) of section fifteen (15), township eleven (11), range twenty-five (25), and one hundred thirty-two (132) feet east of center of said section, thence south six hundred twenty-one and nine-tenths (621.9) feet, west one hundred thirty-two (132) feet, south two hundred fifty-two (252) feet, east one hundred eighty-two (182) feet to southwest corner of lot one (1), block one (1), McAlpine's addition to Armourdale; thence north along west line of said lot one (1), block one (1), one hundred seventy-five (175) feet to southwest corner of lot one (1), block
17 two (2), in said addition; thence east along south line of said block two (2) to the southeast corner of lot ten (10) thereof; thence north along east line of said lot ten (10) to southeast corner of lot eleven (11), block two (2); thence east along south line of north half (½) of block five (5) to southeast corner of lot eleven (11), block five (5), said addition; thence north along east line of said lot eleven (11) to southeast corner of lot ten (10), block four (4); thence east along south line of blocks nine (9) and ten (10), prolonged to west line of lands owned by Swift Packing Company; thence north along said west line three hundred ninety-two and eight-tenths (392.8) feet to the Union Pacific Railway Company's lands; thence west along south line of said railway company's lands fifteen hundred eighty-four and $\frac{75}{100}$ (1,584.75) feet to beginning, excepting right of way one hundred (100) feet wide, fifty (50) feet on each side of center line of Union Pacific tracks as located through said land, twelve and five-hundredths (12.05) acres. Valuation, $12,050.00.

Description No. 8.—Commencing eight (8) poles east of the northwest corner of southeast quarter (¼) of section fifteen (15), township eleven (11), range twenty-five (25), thence south forty (40) poles; thence east to a point fifty (50) feet west from center line of Armourdale spur of the Union Pacific railway, northerly fifty (50) feet from and parallel to center line of said Armourdale spur to the east and west center line of section fifteen (15), township eleven (11), range twenty-five (25); thence west on said line of said section to beginning, excepting right of way one hundred (100) feet wide, fifty (50) feet on each side of center line of Union Pacific tracks as located through said land, being seventeen and fifty-hundredths (17.50) acres. Valuation, $17,500.00.

Description No. 9.—Commencing at intersection of east and west center line of section fifteen (15), township eleven (11), range
18 twenty-five (25), with west bank of Kansas river; thence west along said center line of section fifteen (15), township eleven (11), range twenty-five (25), to a distance of seven hundred thirty-seven (737) feet, more or less, to a point fifty (50) feet from the center of the Armourdale spur of the Union Pacific railway, southerly fifty (50) feet from and parallel to center line of said Armourdale spur, a distance of six hundred eighty-two (682) feet, more or less, to north line of lands owned by Kansas City Stock Yards Company; thence east along said north line of lands owned by Kansas City Stock Yards Company to west bank of Kansas river to place of beginning, eleven and $\frac{63}{100}$ (11.63) acres. Valuation, $6,960.00.

Plaintiffs further allege that the balance of said lands belonging to said Union Pacific Railway Company and included within those attempted to be taken into said city of Kansas City by said ordinance, "Exhibit A," are used for railroad purposes and assessed by the State board of railroad assessors; that said lands, with other lands located in Wyandotte township of said county and used for railroad purposes, appear upon the tax-rolls of Wyandotte county for the year 1893 under the following descriptions and are assessed for the year 1893 at the following values, which valuations appear upon said tax-rolls:

Road-bed, Right of Way, and Other Property Assessed and Returned by State Board of Assessors.

Main track, 11.75 miles, at $12,042.72 per mile.....	$141,502.00
Side track, 26.42 miles, at $2,500.00 per mile.....	66,050.00
Buildings and improvements	26,060.00
Total	$233,612.00

Plaintiffs further allege that that part of said lands used for railway purposes and assessed by the State board of railroad assessors which are included within said ordinance, "Exhibit A," would, if divided from the balance of the right of way located in
19 Wyandotte township and correctly apportioned, appear upon the tax-rolls of said county for the year 1893 under the following descriptions and at the following valuations:

Road-bed, Right of Way, and Other Property Assessed and Returned by the State Board of Railroad Assessors.

Main track, 1.71 miles, at $12,042.72 per mile.....	$20,593.00
Side track, 25.75 miles, at $2,500.00 per mile.....	64,375.00
Buildings and improvements.....	26,000.00
Total.....	$110,968.00

Plaintiffs further allege that such portions of said lands owned by the Union Pacific Railway Company not actually used for railroad purposes are vacant and unoccupied lands which are held and possessed by said railroad company for railroad purposes.

Plaintiffs further allege that the said city of Kansas City has levied and certified to the county clerk of said county of Wyandotte a tax of 29.6 mills on the dollar against all of the taxable property located in said city for the year 1893, and that said tax has been extended and charged by the county clerk upon the tax-rolls of said county against the above-described property of said Union Pacific Railway Company, making the amount of taxes levied against each of said pieces of property by the said city of Kansas City for the year 1893 as follows, to wit:

Description No. 1, valuation,	$11,465.00;	tax.....	$350.83
Description No. 4, valuation,	3,530.00;	tax.....	104.49
Description No. 5, valuation,	9,250.00;	tax.....	273.80
Description No. 6, valuation,	22,500.00;	tax.....	666.00
Description No. 7, valuation,	12,050.00;	tax.....	356.68
Description No. 8, valuation,	17,500.00;	tax...	518.00
Description No. 9, valuation,	9,960.00;	tax...	208.02
			$2,475.82

and in the aggregate the sum of $2,475.82 taxes levied by the said city of Kansas City against said property for the year 1893.

Plaintiffs further allege that said defendant, The Board of Education of the City of Kansas City, has levied and certified to
20 the county clerk of said county a tax of 11.1 mills on the dollar against all of the taxable property located within the boundaries of said city for the year 1893, and that the said tax has been extended and charged by the county clerk of said county upon the tax-rolls of said county against the above-described property of said Union Pacific Railway Company, making the amount of taxes levied against each of said pieces of property by said board of education for the year 1893 as follows, to wit:

Description No. 1, valuation,	$11,465.00;	tax...	$127.26
Description No. 4, valuation,	3,530.00;	tax.....	39.18
Description No. 5, valuation,	9,250.00;	tax....	102.68
Description No. 6, valuation,	22,500.00;	tax...	240.75
Description No. 7, valuation,	12,050.00;	tax.....	133.76
Description No. 8, valuation,	17,500.00;	tax...	194.25
Description No. 9, valuation,	6,960.00;	tax.....	77.25
			$924.13

and in the aggregate the sum of $924.13 taxes levied by said board of education against said property for the year 1893.

Plaintiffs further allege that said defendant, Township of Wyandotte, has levied and certified to the county clerk of said county of Wyandotte a tax of nine (9) mills on the dollar against all the tax-

able property located in said township for the year 1893, and that said tax has been extended and charged by the county clerk of said county upon the tax-rolls of said county against all that portion of the property of said Union Pacific Railway Company attempted to be taken within the limits of said Kansas City by said ordinance, "Exhibit A," which is used for railway purposes, together with other right of way belonging to said railway company located in Wyandotte township, making the total amount of taxes levied by said township against all of said property used for right of way purposes as follows, to wit, the sum of two thousand one hundred two dollars and forty-four cents ($2,102.44).

Plaintiffs further allege that the tax levied by said township would, if extended against that portion of said property used for railroad purposes and included within said ordinance, "Exhibit A," amount to nine hundred ninety-eight dollars and seventy-
21 one cents (998.71).

Plaintiffs further allege that said defendant, School District No. Nine (9), has levied and certified to the county clerk of said Wyandotte county a tax of five (5) mills on the dollar against all the taxable property located in said school district for the year 1893, and that said tax has been extended and charged by the county clerk of said county upon the tax-rolls of said county against all that portion of the property of said Union Pacific Railway Company attempted to be taken within the limits of said Kansas City by said ordinance, "Exhibit A," which is used for railroad purposes, together with other right of way belonging to said company located within said school district number nine (9), making the total amount of taxes levied by said school district against all of said property used for right of way purposes as follows, to wit, the sum of six hundred eighty-six and $\frac{10}{100}$ ($686.10) dollars.

Plaintiffs further allege that the tax levied by said school district would, if extended and charged against that portion of said property used for railway purposes and included within said ordinance, "Exhibit A," amount to five hundred fifty-four and $\frac{84}{100}$ ($554.84) dollars.

Plaintiffs further allege that said defendants, City of Kansas City and Board of Education of Kansas City, claim jurisdiction over all the lands described in said ordinance, "Exhibit A," including that used for railroad purposes, and claim that its levies should have been extended and charged against all of said property, and further claim that the levies of said Wyandotte township and school district No. nine (9) should not have been extended and charged against any portions thereof.

Plaintiffs further allege that said township of Wyandotte and said school district number nine (9) claim that none of said lands described in said ordinance, "Exhibit A," were legally taken into the limits of said Kansas City, and that the same remain
22 within the jurisdiction of said Wyandotte township and said school district, and that its levies should have been extended against all of the lands included in said ordinance, "Exhibit A," and that the levies of said Kansas City and board of education of

Kansas City should not have been extended and charged against any portion thereof.

Plaintiffs allege that they have been advised and accordingly allege that the contention of said township and school district is correct. Plaintiffs say, however, that they stand willing and ready to pay the taxes assessed against all of said property as soon as it has been finally determined which taxes are properly a lien thereon.

Plaintiffs further allege that said M. G. McLean, county treasurer of said county, now has possession of said tax-rolls of Wyandotte county for the year 1893 and propose to and will collect the amounts of said city and school taxes levied against said property as aforesaid, and that said county clerk will continue from year to year to extend the levies of said Kansas City and said board of education of Kansas City against said property of the Union Pacific Railway Company unless prevented by the injunction of some court of competent jurisdiction from doing so.

Wherefore, as plaintiffs are remediless at common law, they pray this court to issue an injunction against said M. G. McLean as county treasurer of said county and against his deputies, assistants, and successors in office, forever enjoining them from collecting the amounts of said city and school taxes levied and charged against said property for the year 1893, as aforesaid, amounting in the aggregate to the sum of three thousand three hundred ninety-nine and $\frac{95}{100}$ ($3,399.95) dollars, and against the said Charles E. Bruce as county clerk of said county, his deputies, assistants, and successors in office, forever enjoining them from extending any further
23 levies of the said city of Kansas and of the board of education of Kansas City against the above-described property of said Union Pacific Railway Company, and that they may be temporarily enjoined from so doing until the final hearing of this cause.

Plaintiffs further pray that in the event of its being finally determined in this case that said lands included in said "Exhibit A" are a part of said Kansas City under and by virtue thereof that the said county treasurer be forever enjoined from collecting the taxes levied and charged against that portion of said property included in said ordinance, "Exhibit A," which are used for railroad purposes and which appear upon said tax-rolls in favor of said township of Wyandotte and school district number nine (9), and that said county clerk be forever enjoined from extending said township and school district levies against said property last above mentioned; and, to the end that the rights of all parties concerned may be properly protected during this litigation, plaintiffs pray for a temporary injunction against said county treasurer, restraining him from collecting the amount of said township and school taxes until the final termination of this case.

Plaintiffs pray for such other and further or different relief as in equity and good conscience they may be entitled to.

A. L. WILLIAMS,
N. H. LOOMIS, AND
R. W. BLAIR,
Attorneys for Plaintiffs.

24 STATE OF KANSAS, *Wyandotte County,* } ss:

A. W. Scribner, being first duly sworn, says that he is the tax commissioner for the plaintiffs; that as such tax commissioner he has charge of the payment of taxes levied against the property of said Union Pacific Railway Company; that said plaintiffs cannot personally verify this petition for the reason that they are not within the State of Kansas, and, furthermore, because they are not sufficiently familiar with the facts in this case to make such verification.

Affiant further states that he has read the foregoing petition and knows the contents thereof, and that the allegations of fact therein contained are true.

A. W. SCRIBNER.

Subscribed and sworn to before me this 15th day of December, 1893.

A. L. BERGER,
Notary Public.

[SEAL.]

My commission expires Jan. 23rd, 1895.

Precipe.

To the clerk of said court:

Please issue summons in the above-entitled cause, directed to the sheriff of Wyandotte county, Kansas, and made returnable according to law. Suit brought to restrain collection of taxes and other relief.

A. L. WILLIAMS,
N. H. LOOMIS, AND
R. W. BLAIR,
Attorneys for Plaintiff.

25 "EXHIBIT A."

Ordinance No. 2163.

An ordinance adding certain lands therein described, known as the Union Pacific lands, to and making the same a part of the city of Kansas City, Kansas.

Whereas, a certain unplatted territory belonging to the Union Pacific Railroad Company, lies upon and mainly within the city of Kansas City, Kansas; and is so situated as to be bounded on three-fourths (¾) its boundary line by platted territory of, and adjoining to said city; which said railroad land by virtue of its location enjoys the benefit- of said city without sharing its burden-; now therefore,

Be it ordained by the mayor and councilmen of the city of Kansas City, Kansas:

SECTION 1. That the following-described territory, to wit:

Commencing at the northeast corner of the southeast quarter (¼) of section fifteen (15), township eleven (11), range twenty-five (25)

east, in Wyandotte county, Kansas; thence south forty (40) poles; thence east to the Kansas river; thence down the same to the prolongation of the east and west center line of said section fifteen (15); thence west to beginning.

Also, commencing at the northeast corner of the southeast quarter (¼) of section fifteen (15), township eleven (11), range twenty-five (25) east in Wyandotte county, Kansas; thence west to the center line of said section fifteen (15); thence north eighty (80) poles; thence west fifty-seven (57) poles; thence south to the southerly line of Fifth street in the original town site of Armstrong; thence along the southerly line of Fifth street to its intersection with the southerly line of Muncie boulevard; thence westerly along the southerly line of Muncie boulevard to the west line of said section fifteen (15); thence south to the southwest corner of the southwest quarter (¼) of section fifteen (15); thence east eighty (80) poles; thence
26 north fifty-two (52) poles; thence east eighty-five (85) poles; thence north twenty-eight (28) poles; thence east eight (8) poles; thence north one hundred ninety-nine (199) feet; thence east three hundred fifty-five and $^{8}/_{10}$ (355.8) feet to the east line of Third street in McAlpine's addition; thence north one hundred sixty (160) feet; thence east two hundred seventy-five (275) feet to the center line of Second street in McAlpine's addition, produced; thence north one hundred thirty (130) feet; thence east three hundred fifteen (315) feet; to the prolongation to the center line of First street in McAlpine's addition; thence north one hundred thirty-two and eight-tenths (132.8) feet; thence east to the east line of said section fifteen (15); thence north forty (40) poles to beginning.

Also, commencing at a point where the northerly line of the Union Pacific Railway Company's right of way intersects the east line of section sixteen (16), township eleven (11), range twenty-five (25) east in Wyandotte county, Kansas; thence northwesterly along said northerly line of the right of way of the Union Pacific railway to the west line of said section sixteen (16); thence south along the west line of said section sixteen (16) about one hundred (100) feet to the southerly line of the right of way of the Union Pacific railway; thence southeasterly along the southerly line of said right of way to the east line of said section sixteen (16); thence north about one hundred (100) feet to beginning.

Said tracts being contiguous and containing in the aggregate one hundred seventy-two (172) acres, be and hereby is added to and make a part of the city of Kansas City, Kansas.

SEC. 2. This ordinance shall take effect and be in force from and after its passage and publication in the Kansas City Gazette.

Passed in council March 8, 1892.

WILLIAM ALBRIGHT, *City Clerk.*

Approved March 11, 1892.

THOS. HANNAN, *Mayor.*

(Published March 11, 1892.)

Endorsed: "1647. (Caption.) Petition and precipe. Filed December 15th, 1893. C. S. McGonigal, clerk, by F. L. Kenny, deputy."

27 *Bond for Costs.*

In the Court of Common Pleas of Wyandotte County, Kansas.

S. H. H. CLARK ET AL., as Receivers of the Union Pacific R'y Co., Plaintiffs,
vs.
THE CITY OF KANSAS CITY, KANSAS, ET AL., Defendants.

STATE OF KANSAS, *Shawnee County,* } *ss:*

We hereby undertake and bind ourselves to pay all costs that may accrue in said action in case plaintiff shall be adjudged to pay them, or in case the same cannot be collected from the defendants, if judgment be obtained against them, that the plaintiffs will pay all the costs made in the above-entitled cause.

J. O. BRINKERHOFF.
H. P. DILLON.
GEO. E. CURTISS.

Approved by me this 15th day of December, 1893.

C. S. McGONIGAL, *Clerk,*
By F. L. KENNY, *Deputy.*

Endorsed: "No. 1647. (Caption.) Bond for costs. Filed Dec. 15, 1893. C. S. McGonigal, clerk. F. L. Kenny, deputy."

28 THE UNITED STATES OF AMERICA:

THE STATE OF KANSAS, *Wyandotte County,* } *ss:*

Court of Common Pleas.

The State of Kansas to the sheriff of Wyandotte county, in said State, Greeting:

You are hereby commanded to notify The City of Kansas City, Kansas; The Board of Education of the City of Kansas City, Kansas; M. G. McLean, as county treasurer of Wyandotte county, Kansas; Charles E. Bruce, as county clerk of Wyandotte county, Kansas; The Township of Wyandotte of Wyandotte County, Kansas, and School District No. Nine (9) of Wyandotte County, Kansas, defendants, that they have been sued by S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, as receivers of the Union Pacific Railway Company, plaintiffs, in the court of common pleas, sitting within and for the county of Wyandotte, and that unless they answer by the 12th day of January, 1894, the petition of said plaintiffs against them filed in the clerk's office of the court aforesaid, the same will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 23rd day of December, 1893.

Witness my hand and the seal of said court, affixed at my office, in the city of Kansas City, Kansas, this 15 day of December, 1893.

C. S. McGONIGAL, *Clerk*,
[SEAL.] By F. L. KENNY, *Deputy*.

(Endorsed:) "No. 1647. Court of common pleas, Wyandotte county, Kansas. Summons. Issued December 15th, 1893. Returnable Dec. 23, 1893. (Caption.) Williams, Loomis & Blair, plaintiffs' attorneys. Filed Dec. 26, 1893. C. S. McGonigal, clerk, by F. L. Kenny, deputy. Temporary restraining order allowed. Suit brought for the recovery of money. C. S. McGonigal, clerk, by F. L. Kenny, dep."

29 STATE OF KANSAS, } ss:
County of Wyandotte, }

Received this summons on the 15th day of December, 1893, at ten o'clock a. m., and served the same, in my county, on the within-named defendant, The City of Kansas City, Kansas, by delivering to N. Barnes personally, as mayor of said city, a true copy of said summons with all the endorsements thereon. Served the same on the Board of Education of the City of Kansas City, Kansas, by delivering to J. H. Gadd personally, as president of said board, a true copy of said summons as above. Served the same on M. G. McLean, as county treasurer of Wyandotte county, Kansas, by delivering to him personally a true copy of said summons as above. Served the same on Charles E. Bruce, as county clerk of Wyandotte county, by delivering to him personally a true copy of said summons as above; served the same on the Township of Wyandotte of Wyandotte County, Kansas, by delivering to James Moore personally, as trustee of said township, a true copy of said summons as above, and served the same on the School District No. Nine (9) of Wyandotte County, Kansas, by delivering to C. S. Mead personally, as director of said district, a true copy of said summons, as above, on the 20th day of December, 1893.

S. S. PETERSON,
Sheriff of Wyandotte County, Kansas,
By J. S. CUMMINS, *Deputy*.

Copies	1.50
Service	1.75
Mileage	2.00
Total	$5.25

30 *Summons.*

THE UNITED STATES OF AMERICA:

THE STATE OF KANSAS, } ss:
Wyandotte County, }

Court of Common Pleas.

The State of Kansas to the sheriff of Wyandotte county, in said State, Greeting:

You are hereby commanded to notify The City of Kansas City, Kansas; The Board of Education of The City of Kansas City, Kansas; M. G. McLean, as county treasurer of Wyandotte county, Kansas; Charles E. Bruce, as county clerk of Wyandotte county, Kansas; The Township of Wyandotte of Wyandotte County, Kansas, and School District No. Nine (9) of Wyandotte County, Kansas, defendants, that they have been sued by S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, as receivers of the Union Pacific Railway Company, plaintiff-, in the court of common pleas, sitting within and for the county of Wyandotte, and that unless they answer by the 12th day of January, 1894, the petition of said plaintiff against them filed in the clerk's office of the court aforesaid the same will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 23rd day of Dec., 1893.

Witness my hand and the seal of said court, affixed at my office, in the city of Kansas City, Kansas, this 15th day of Dec., 1893.

C. S. McGONIGAL, *Clerk,*
[SEAL.] By F. L. KENNY, *Deputy.*

(Endorsed:) "No. 1647. Court of common pleas of Wyandotte county, Kansas. Summons. Issued Dec. 15, 1893. Returnable Dec. 23, 1893. (Caption.) Williams, Loomis & Blair, plaintiffs' attorneys. Temp. res. order allowed. C. S. McGonigal, clerk, by F. L. Kenny, dep."

31 In the Court of Common Pleas of Wyandotte County, Kansas.

S. H. H. CLARK ET AL., as Receivers of the Union Pacific R'y Co., Plaintiffs,
vs.
THE CITY OF KANSAS CITY, KANSAS; THE BOARD OF Education of the City of Kansas City, Kansas; M. G. McLean, as County Treasurer of Wyandotte County, Kansas; The Township of Wyandotte of Wyandotte County, Kansas, and School District No. 9 of Wyandotte County, Kansas, Defendants. } No. 1647.

Order.

Upon this 15th day of December, 1893, come the plaintiffs above named, by N. H. Loomis, their attorney, and present to the court

their petition in the above-entitled cause, duly verified, wherein they pray for a temporary injunction against the said M. G. McLean, as county treasurer of Wyandotte county, Kansas, restraining him from collecting certain taxes therein mentioned; upon due consideration whereof it is by the court ordered that the hearing upon said application for a temporary injunction be set for January 5th, 1894, at 10 o'clock a. m., or as soon thereafter as the attention of the court may be had. In the meantime and until the further order of the court it is hereby ordered that the said M. G. McLean, as county treasurer, his deputies, assistants, and successors in office, be, and they are hereby, restrained from collecting the taxes referred to in plaintiff's petition in accordance with the prayer thereof, to wit, the levies of the city of Kansas City, Kansas, and the board of education of Kansas City, Kansas, for the year 1893 against descriptions of land numbered one (1), four (4), five (5), six (6), seven (7), eight (8), and nine (9), as shown in said petition; also the levies of said Wyandotte township and said school district No. nine (9) for the year 1893 against so much of the road-bed, right of way,
32 and other property of said railway company assessed by the State board of assessors as is located within the descriptions contained in "Exhibit A" to said petition and which is described as follows:

Main track, 1.71 miles, at $12,042.72 per mile.....	$20,593.00
Side track, 25.75 miles, at $2,500.00 per mile.....	64,375.00
Buildings and improvements.....	26,000.00
Total.....	$110,968.00

O K.
T. P. ANDERSON, *Judge.*

Attest: C. S. McGONIGAL, *Clerk,*
[SEAL.] By F. L. KENNY, *Deputy.*

Endorsed: "No. 1647."

33 In the Court of Common Pleas of Wyandotte County, Kansas.

S. H. H. CLARK, OLIVER W. MINK, E. ELLERY ANDERSON, J. W. Doane, and F. R. Coudert, Receivers of the Union Pacific Railway Company, Plaintiffs,

vs.

THE CITY OF KANSAS CITY, KANSAS; THE BOARD OF EDUCATION of Kansas City, Kansas; M. G. McLean, County Treasurer of Wyandotte County, Kansas, and C. E. Bruce, County Clerk of Wyandotte County, Kansas, Defendants.

Know all men by these presents that J. R. Mulvane and Henry Strong, of Topeka, Shawnee county, Kansas, are held and firmly bound unto the above-named defendants and each and every of them in the penal sum of twenty-five hundred ($2,500.00) dollars, for the

payment of which they hereby bind themselves, their heirs, executors, administrators, and assigns.

The conditions of the above obligation are such that whereas a temporary injunction was granted by said court in the above-entitled cause, to take effect upon the filing by said plaintiffs of an injunction bond in the sum of twenty-five hundred ($2,500.00) dollars, subject to the approval of the clerk of this court:

Now, if the above-named plaintiffs shall save defendants and each and every of them harmless from all damages which they or either of them may sustain if it be finally decided that said temporary injunction ought not to have been granted, then this obligation to be null and void; otherwise to remain in full force and effect.

In witness whereof said parties have hereunto set their hands and seals this 3 day of November, A. D. 1894.

J. R. MULVANE.
HENRY STRONG.

34 STATE OF KANSAS, } ss:
County of Shawnee, }

The above-named J. R. Mulvane, of lawful age, being by me first duly sworn, deposes and says that he is worth, over and above all legal exemptions and liabilities, more than the sum of twenty-five hundred ($2,500.00) dollars.

J. R. MULVANE.

Subscribed and sworn to before me this 3rd day of November, 1894.

[SEAL.] FRANK E. SMITH,
Notary Public.

My commission expires February 27, 1898.

STATE OF KANSAS, } ss:
County of Shawnee, }

The above-named Henry Strong, of lawful age, being by me first duly sworn, deposes and says that he is worth, over and above all legal exemptions and liabilities, more than the sum of twenty-five hundred ($2,500.00) dollars.

HENRY STRONG.

Subscribed and sworn to before me this 3rd day of November, 1894.

[SEAL.] FRANK E. SMITH,
Notary Public.

My commission expires Feb. 27, 1898.

The above bond approved November 5th, 1894.

GEO. H. JENKINS, *Clerk.*

Endorsed: "1647. Bond. (Caption.) Filed November 5th, 1894. Geo. H. Jenkins, clerk."

35 STATE OF KANSAS, } ss:
Wyandotte County, }

In the Court of Common Pleas in said County and State.

S. H. H. CLARK ET AL, Receivers for the Union Pacific Railway Company, Plaintiffs,
vs.
THE CITY OF KANSAS CITY ET AL., Defendants. } No. 1647.

Demurrer.

The City of Kansas City, Kansas; Benjamin Schnierle, county treasurer; Chas. E. Bruce, county clerk of Wyandotte county, Kansas, and The Board of Education of the City of Kansas City, Kansas, demur to the petition in this action, and for cause of demurrer state that it appears upon the face of the petition:

First. That the petition does not state facts sufficient to constitute a cause of action.

K. P. SNYDER,
T. A. POLLOCK,
Attorneys for the Defendants Kansas City et al.
S. C. MILLER,
Attorney for Defendants Benjamin Schnierle, County Treasurer, & C. E. Bruce, County Clerk.

Endorsed: "No. 1647. Court of common pleas. (Caption.) Demurrer. Filed June 12th, 1895. Geo. H. Jenkins, clerk. K. P. Snyder & T. A. Pollock, def'ts' att'ys."

36 In the Court of Common Pleas of Wyandotte County, Kansas.

S. H. H. CLARK, OLIVER W. MINK, E. ELLERY ANDERSON, J. W. Doane, and F. R. Coudert, Receivers of the Union Pacific Railway Company, Plaintiffs,
vs.
THE CITY OF KANSAS CITY, KANSAS; THE BOARD OF EDUCATION of the City of Kansas City, Kansas; M. G. McLean, as County Treasurer of Wyandotte County, Kansas; Chas E. Bruce, as County Clerk of Wyandotte County, Kansas, and School District No. Nine of Wyandotte County, Kansas, Defendants.

Motion.

Now come the above-named plaintiffs and show to the court that subsequent to the filing of the petition in this cause and upon the 16th day of July, 1894, the above-named S. H. H. Clark, Oliver W. Mink, and E. Ellery Anderson were by the United States circuit court for the district of Kansas, in an action pending in said court wherein Russel Sage and George J. Gould, trustees, were complainants and The Union Pacific Railway Company *et al.* were defendants, appointed receivers of that portion of the railway and properties of

the Union Pacific Railway Company covered by the consolidated mortgage of the Kansas Pacific Railway Company, dated the first day of May, 1879; that by said order the said Clark, Mink, and Anderson, as receivers, were directed to retain possession of the lands, land grant, railroad, and property of said Union Pacific Railway Company covered by said Kansas Pacific consolidated mortgage and as receivers in said Sage and Gould case to continue to maintain and operate all and singular the lines of railway embraced in said mortgage as a part of the Union Pacific system.

Said plaintiffs further show to the court that immediately after their appointment as receivers in the Sage and Gould case, as
37 aforesaid, the said Clark, Mink, and Anderson duly qualified and entered upon the discharge of their duties as such receivers.

That thereafter John W. Doane and Frederick R. Coudert were duly appointed by the United States circuit court for the district of Kansas in said case of Sage and Gould against The Union Pacific Railway Company *et al.* additional receivers for that portion of the railway lines and properties of the Union Pacific Railway Company covered by said Kansas Pacific consolidated mortgage, with powers in all respects similar and equal to those conferred upon said Clark, Mink, and Anderson; that immediately after their appointment said Doane and Coudert duly qualified and entered upon the discharge of their duties as such receivers.

Said plaintiffs further show to the court that all of the property in controversy in this cause is covered by said Kansas Pacific consolidated mortgage, and that the same is now in the exclusive charge and custody of said S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederick R. Coudert, as receivers in said case of Sage and Gould, trustees, against The Union Pacific Railway Company *et al.*, and that as receivers in said Sage and Gould case they have succeeded to all the powers conferred upon them as receivers under the terms of their original appointment, the said original appointment being the same appointment referred to in the petition filed in this cause.

Wherefore the said S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederick R. Coudert pray that this action may be continued in their names as receivers of the Union Pacific Railway Company appointed in the case of Russel Sage and George J. Gould, trustees, against The Union Pacific Railway Company *et al.*, pending in the United States circuit court for the district of Kansas, first division.

A. L. WILLIAMS,
N. H. LOOMIS, AND
R. W. BLAIR,
Attorneys for said Receivers.

38 STATE OF KANSAS, }
Shawnee County, } ss:

N. H. Loomis, being duly sworn, says that he is one of the attorneys for the above-named receivers; that he has read the foregoing

and known the contents thereof, and that the statements of fact therein contained are true.

N. H. LOOMIS.

Subscribed and sworn to before me this 23d day of March, A. D. 1895.

FRANK E. SMITH,
[SEAL.] *Notary Public.*

My commission expires Feb'y 27, 1898.

Endorsed: "No. 1647. In the court of common pleas of Wyandotte county, Kansas. (Caption.) (Motion.) (No. 2090.) Filed June 13th, 1895. Geo. H. Jenkins, clerk."

39 In the Court of Common Pleas of Wyandotte County, Kansas.

S. H. H. CLARK, OLIVER W. MINK, E. ELLERY ANDERSON, J. W. Doane, and F. R. Coudert, Receivers of the Union Pacific Railway Company, Plaintiffs,

vs.

THE CITY OF KANSAS CITY, KANSAS; THE BOARD OF EDUCATION of the City of Kansas City, Kansas; M. G. McLean, as County Treasurer of Wyandotte County, Kansas; Chas. E. Bruce, as County Clerk of Wyandotte County, Kansas, and School District No. Nine of Wyandotte County, Kansas, Defendants.

Journal Entry.

Upon this 13th day of June, 1895, the plaintiffs appearing by A. L. Williams, Moore & Berger, and N. H. Loomis, their attorneys, and the defendant appearing by K. P. Snyder and T. A. Pollock, their attorneys, and it being made to appear to the court that the above-named S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert have, since the commencement of this action, been appointed receivers of that portion of the Union Pacific railway covered by the consolidated mortgage of the Kansas Pacific Railway Company, including all of the property in controversy in this cause, by the United States circuit court for the district of Kansas, in an action therein pending wherein Russel Sage and George J. Gould are complainants and The Union Pacific Railway Company *et al.* are defendants, and that — such receivers in the Sage and Gould case they now have exclusive charge and control of all the property in controversy in this cause and have succeeded to all the powers possessed by them over said property under their original appointment, said original appointment being the same appointment referred to in plaintiffs' petition filed herein.

And now upon the application of said S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, and all parties consenting thereto, it is by the court ordered that this cause be continued in the name of said S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert as receivers of

the Union Pacific Railway Company, appointed in the case of Russel Sage and George J. Gould, trustees, against the Union Pacific Railway Company *et al.*, pending in the United States circuit court
40 for the district of Kansas, first division.

It being further made to appear to the court that the above-named M. G. McLean has been succeeded as county treasurer of Wyandotte county by Benjamin Schnierle, it is by the court ordered, all parties consenting thereto, that said Benjamin Schnierle be substituted as a party defendant herein in the place of said M. G. McLean.

Endorsed: "No. 1642. In the court of common pleas of Wyandotte county, Kansas. (Caption.) Journal entry."

41 In the Court of Common Pleas of Wyandotte County, Kansas.

S. H. H. CLARK, OLIVER W. MINK, E. ELLERY ANDERSON, J. W. DOANE, and F. R. COUDERT, Receivers of the Union Pacific Railway Company, Plaintiffs,

v.

THE CITY OF KANSAS CITY, KANSAS; THE BOARD OF Education of the City of Kansas City, Kansas; Benjamin Schnierle, as County Treasurer of Wyandotte County, Kansas; Chas. E. Bruce, as County Clerk of Wyandotte County, Kansas; the Township of Wyandotte of Wyandotte County, Kansas, and School District No. Nine of Wyandotte County, Kansas, Defendants. } No. 1647.

Journal Entry.

JULY 3, 1895.

Upon this day comes — regularly on for final hearing upon the issues joined herein, the defendants having announced that they intend to stand upon their demurrer to plaintiffs' petition. Plaintiffs appeared by A. L. Williams, Moore & Berger, and N. H. Loomis, their attorneys. The defendants appeared by K. P. Snyder and T. A. Pollock, their attorneys. The court, having heard the arguments of counsel and being fully advised in the premises, finds and adjudges that the statute under which the property of the Union Pacific Railway Company in controversy in this cause was attempted to be taken within the limits of Kansas City, Kansas, to wit, chapter 74 of the Session Laws of Kansas for 1891, being an act entitled "An act relating to cities of the first class, and the adding thereto certain adjoining territory," is unconstitutional, null, and void, and therefore that said property of the Union Pacific Railway Company is not and has not been included within the limits of Kansas City, Kansas, because said ordinance set forth in plaintiffs' petition is void, being based upon an unconstitutional law, and is not and has not been subject to the jurisdiction of said city.

Wherefore the demurrer of defendants to plaintiffs' petition is overruled; to which ruling of the court the defendants duly except.

It is therefore ordered, adjudged, and decreed that said defendant, Benjamin Schnierle, as county treasurer of Wyandotte
42 county, Kansas, his deputies, assistants, clerks, and successors in office, and each and every one of them, be, and they are hereby, permanently enjoined from collecting the tax levies or assessments of said city of Kansas City, Kansas, and the board of education of the city of Kansas City, Kansas, against the following-described lands of the Union Pacific Railway Company:

1. Commencing at the northeast corner of the southeast quarter (¼) of section fifteen (15), township eleven (11), range twenty-five (25) east, in Wyandotte county, Kansas, thence south forty (40) poles; thence east to the Kansas river; thence down the same to the prolongation of the east and west center line of said section fifteen (15); thence west to beginning.

2. Also commencing at the northeast corner of the southeast quarter (¼) of section fifteen (15), township eleven (11), range twenty-five (25) east, in Wyandotte county, Kansas, thence west to the center of said section fifteen (15); thence north eighty (80) poles; thence west fifty-seven (57) poles; thence south to the northerly line of Euclid avenue in the original township of Armstrong; thence easterly along the northerly line of Euclid avenue to the southerly line of Fifth street; thence along the southerly line of Fifth street to its intersection with the southerly line of Muncie boulevard; thence westerly along the southern line of the Muncie boulevard to the west line of said section fifteen (15); thence south to the southwest corner of the southwest quarter (¼) of section fifteen (15); thence east eighty (80) poles; thence north fifty-two (52) poles; thence east eighty-five (85) poles; thence north twenty-eight (28) poles; thence east eight (8) poles; thence north one hundred ninety-nine (199) feet; thence east three hundred fifty-five and eight-tenths (355.8) feet to the east line of Third street, in McAlpine's addition; thence north one hundred sixty (160) feet; thence east two hundred seventy-five (275) feet to the center line of Second street, in McAlpine's ad-
43 dition, produced; thence north one hundred thirty (130) feet; thence east three hundred fifteen (315) feet to the prolongation to the center line of First street, in McAlpine's addition; thence north one hundred thirty-two and $\frac{8}{10}$ (132.8) feet; thence east to the east line of said section fifteen (15); thence north forty (40) poles to the beginning.

Excepting, however, from the foregoing description the following-described tract of land conveyed by the Union Pacific Railway Company to the Kansas City & Topeka Railway Company, March 11, 1889, to wit:

A strip of land three hundred eighty-two and $\frac{48}{100}$ (382.48) feet wide through the west half (½) of the southwest quarter of said section fifteen (15), more specifically described as follows: Beginning at a point five hundred fifty-three (553) feet north of the southeast corner of the southwest quarter (¼) of the southwest quarter (¼) of said section fifteen (15), said point being one hundred fifty (150) feet south of the center line of the main track of the Kansas City and Topeka railway as now located, thence westerly and parallel

to the center line of said track thirty-five (35) feet; thence south one hundred eighty-two and $\frac{48}{100}$ (182.48) feet; thence westerly and parallel to the center line of said track three hundred thirty-two and $\frac{48}{100}$ (332.48) feet distant therefrom to the west line of said section fifteen (15); thence north along the west line of said section fifteen (15) three hundred ninety-two and $\frac{30}{100}$ (392.30) feet; thence easterly and parallel to the center line of said main track and fifty (50) feet distant therefrom thirteen hundred sixty-two (1.362) feet to the east line of the west half ($\frac{1}{2}$) of the southwest quarter ($\frac{1}{4}$) of said section fifteen (15); thence south two hundred (200) feet to the place of beginning.

3. Also commencing at a point where the northerly line of the Union Pacific Railway Company's right of way intersects the east line of section sixteen (16), township eleven (11), range twenty-five (25) east, in Wyandotte county, Kansas, thence northwesterly along said northerly line of the right of way of the Union
44 Pacific railway to the west line of said section sixteen (16); thence south along the west line of said section sixteen (16) about one hundred (100) feet to the southerly line of the right of way of the Union Pacific railway; thence southeasterly along the southerly line of said right of way to the east line of said section sixteen (16); thence north about one hundred (100) feet to beginning.

It is further ordered, adjudged, and decreed by the court that said defendant, C. E. Bruce, as county clerk of said county, his deputies, assistants, clerks, and successors in office, and each and every of them be, and they are hereby, enjoined from extending upon the tax-rolls of said Wyandotte county, Kansas, against said property of the Union Pacific Railway Company any of the tax levies or assessments of said city of Kansas City, Kansas, or of the said board of education of Kansas City, Kansas.

It is further ordered by the court, by consent of parties, that the levies of the proper townships and school districts be extended against said property of the Union Pacific Railway Company upon the tax-rolls of said Wyandotte county in lieu of the levies of said city of Kansas City, Kansas, and said board of education of Kansas City, Kansas, here enjoined, but no penalties, interest, or costs shall be added; said taxes to be collected in the manner prescribed by law.

It is further ordered that the extension of said levies against said property, as aforesaid, and the collection of said taxes be stayed until this cause has been finally disposed of on appeal to the Supreme Court or until defendants have filed a written statement herein declaring their intention not to appeal.

It is further ordered, adjudged, and decreed that the plaintiffs do have and recover of and from said defendants their costs herein, taxed at fifty-six dollars and forty cents ($56.40), for which let execution issue.

It is further adjudged and decreed that this judgment shall
45 not in any way affect any rights vested in the defendants or either of them by virtue of any contract heretofore entered

into between said Union Pacific Railway Company and said Kansas City for the building of a viaduct over the land above described.

O K.

N. H. LOOMIS,
Att'y for Plaintiffs.

Endorsed: "No. 1647."

46 Supreme Court, State of Kansas.

THE CITY OF KANSAS CITY, KANSAS, ET AL., Plaintiffs in Error,
vs.
S. H. H. CLARK ET AL., Receivers, etc., of the Union Pacific Railway Company, Defendants in Error.

Supreme court, State of Kansas.

The State of Kansas to the court of common pleas within and for the county of Wyandotte, within and for the State of Kansas, Greeting:

Whereas in a certain civil action lately pending before you, wherein S. H. H. Clark *et al.*, receivers of the Union Pacific Railway Company, were plaintiffs and The City of Kansas City *et al.* were defendants, a judgment was rendered by you against the said City of Kansas City *et al.*, on a transcript of which judgment and record the said The City of Kansas — *et al.* prosecuted a petition in error in the supreme court within and for the State of Kansas; and

Whereas at the June session of the January term of said court, A. D. 1898, on consideration of the said petition in error it was ordered and adjudged by the said supreme court that the judgment of the said court of common pleas be reversed and said cause be remanded to the said court of common pleas with directions to sustain the demurrer to the plaintiffs' petition; and

Whereas the said S. H. H. Clark *et al.*, receivers, etc., defendants in error, upon a transcript and record of the said judgment of the supreme court did prosecute a writ of error and an appeal to the Supreme Court of the United States; and

Whereas at the October, A. D. 1898, term of the said Supreme Court of the United States upon consideration of the said transcript and record and said writ of error it was ordered and adjudged by the said Supreme Court of the United States that the said
47 writ of error in said cause be dismissed for the want of jurisdiction, and that said cause be remanded to the judges of the supreme court of the State of Kansas for such proceedings as are in conformity with the judgment and decree of the Supreme Court of the United States and the judgment and decree of the supreme court of the State of Kansas, the said writ of error to the Supreme Court of the United States to the contrary notwithstanding;

And whereas on the 31st day of January, A. D. 1899, there was issued from the Supreme Court of the United States a mandate, directed to the judges of the supreme court of the State of Kansas,

directing them to carry into effect the judgment of the said Supreme Court of the United States, as hereinbefore set forth; and

Whereas on the 9th day of February, A. D. 1899, it was by the said supreme court of the State of Kansas ordered and decreed that the mandate of the Supreme Court of the United States be spread upon the records of the supreme court of the State of Kansas, and that the mandate of the said supreme court of the State of Kansas forthwith issue to the court of common pleas of Wyandotte county, Kansas, in accordance with the said judgment and decree of the Supreme Court of the United States:

You are therefore commanded that without delay you cause execution to be made of the said judgment of the supreme court of the State of Kansas according to law, the said petition in error and the said writ of error to the contrary notwithstanding.

Witness my hand and the seal of the supreme court of the State of Kansas hereunto affixed, at my office, in the city of Topeka, on the 10th day of February, A. D. 1899.

[SEAL.]

JNO. MARTIN,
Clerk Supreme Court,
By F. J. FRITCH, *Deputy.*

Certified copy of syllabus, opinion, and mandate from supreme court filed. Entered Feb'y 13, '99.

C. W. LITCHFIELD, *Clerk,*
By F. L. KENNY, *Deputy.*

48 THE CITY OF KANSAS CITY ET AL.
vs.
THE UNION PACIFIC RAILWAY COMPANY ET AL. } 10571.

Error from Wyandotte county reversed.

Syllabus by the Court—Doster, C. J.

1. One cannot be heard to complain that a statute which discriminates between classes of persons in the imposition of burdens of municipal control and taxation is unconstitutional as being a denial of the equal protection of the law, unless he belongs to one of the classes discriminated against.
2. The statute, section fifteen (15), chapter thirty-two (32), General Statutes 1897, which provides for the extension of city boundaries over certain classes of adjoining lands, is not violative of the fourteenth amendment to the Constitution of the United States because it exempts agricultural lands from its provisions.

All the justices concurring.
A true copy.
Attest:
[SEAL.]

J. MARTIN,
Clerk Supreme Court.

49 THE CITY OF KANSAS CITY ET AL.
vs.
THE UNION PACIFIC RAILWAY COMPANY ET AL. } 10571.

Error from Wyandotte county reversed.

The opinion of the court was delivered by DOSTER, C. J.:

Section 1, chapter 74, Laws of 1891, section 15, chapter 32, General Statutes 1897, reads as follows:

"That whenever any territory adjoining or touching the city limits of any city of the first class having a population of thirty thousand (30,000) inhabitants or more shall be subdivided into lots and blocks, or whenever any unplatted tract of land shall lie upon or mainly within any such city, or is so situated as to be bounded on three-fourths (¾) of its boundary line by platted territory of or adjacent to such city or by the boundary line of such city or by both, the same may be added to and made a part of the city by ordinance duly passed, which ordinance shall describe the territory by giving the name of the subdivision or addition as platted and by giving the metes and bounds of each tract and plat so taken in separately, or of the entire tract or tracts so taken in with the section, town, range and county in which the same is located without further proceedings; but nothing in this act shall be taken or held to apply to any tract or tracts of land used for agricultural purposes, when the same is not owned by any railroad or other corporation."

By ordinance of March 8th, 1892, the city council of Kansas City, in pursuance to the above statute, extended the city boundaries so as to include certain lands belonging to the defendant in error The Union Pacific Railway Company. The preamble to this ordinance reads as follows:

"Whereas, a certain unplatted territory belonging to the Union Pacific Railroad Company lies upon and mainly within the
50 city of Kansas City, Kansas, and is so situated as to be bounded on three-fourths (¾) of its boundary line by platted territory of, and adjoining to said city; which said railroad land, by virtue of its location, enjoys the benefits of said city, without sharing its burdens, now therefore,"

This preamble shows that the added tracts belonged to one of the classes of lands the annexation of which is authorized by the statute. The defendant in error obtained a perpetual injunction against the collection of city taxes to which the lands in question became subject after their incorporation into the city limits. Error is now prosecuted from the judgment awarding the injunction. The questions for decision are presented to this court, as in the court below, upon the demurrer of the defendants, now plaintiffs in error, to the petition of the plaintiffs, now defendants in error. The contention of the defendants in error as that the act providing for the extension of city boundaries discriminates between classes of real-estate owners and is therefore violative of that part of the fourteenth amendment to the Constitution of the United States which prohibits the States from depriving persons of property with-

out due process of law, or denying to persons within their jurisdiction the equal protection of the law. This contention is based upon the exception forming the last clause of the statute quoted: "But nothing in this act shall be taken or held to apply to any tract or tracts of land used for agricultural purposes when the same is now owned by any railroad or other corporation." So far as this statute discriminates between classes of owners of agricultural lands, the defendants in error cannot be heard to *explain*.

Their lands are not agricultural lands; at least, they do not allege them to be such lands, but, on the contrary, allege that parts of them are used for railroad purposes, and that the remaining portions are vacant and unoccupied lands, held and possessed
51 for railroad purposes. Owning no agricultural land, the defendants in error are not affected by the discrimination which the statute makes between the different classes of owners of such kind of land, and they cannot therefore be heard to complain on that score.

"A court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect and who has therefore no interest in defeating it." Cooley's Constitutional Limitations, 6 ed., 196.

The statute, however, does exempt some agricultural lands from its operation. Of this the defendants in error complain and for the like reason as before. The discrimination in this particular is not in respect of the ownership of the lands, but in respect of their character—the uses to which devoted. It is not claimed in specific terms that the legislature is powerless to authorize the extension of city boundaries over lands platted for city purposes and used for city residences, and at the same time exempt agricultural lands having to the city like relations of situation, contiguity and otherwise. Such claim is comprehended, however, within the general scope of the argument made. We do not assent to it. No case in assertion of such doctrine has been cited to us and none we believe can be found. The very fact of land not already surrounded by incorporated portions of the city being used for agricultural purposes is *prima facie* evidence of the rightfulness of its exemption from municipal control. "The fundamental idea of a municipal incorporation is to invest compact or dense populations with the power of local self-government. Indeed, the necessity for such corporations springs from the existence of centers or agglomerations of population, having by reason of density and numbers local or peculiar interests and wants not common to adjoining sparsely settled or agricultural regions." Dillon's Municipal Corporations, 3 ed., sec. 183.

Municipal incorporation involves of necessity the idea of
52 corporate limits coterminous with the urban population and exclusive of the adjoining agricultural tracts. City limits are not of course always terminable with population. Manufacturing and other industrial institutions, like railway yards, roundhouses, grain elevators, and the like, are often situated beyond the limits of city population. Ordinarily in such cases they are immediately adjoining it. In and around such places many persons are

employed at labor both day and night, and the necessity for the inclusion of such places within city boundaries is just as great as though they formed parts of the residence and business portions of the city. To say that the tracts of land upon which these industrial institutions are situated may not be included within city boundaries and subjected to municipal control because an adjoining tract of land used for farming purposes, but equally as near to the heart of the city, is not likewise brought within the city limits, is a claim to us unheard of before. It is the business of the legislature to enact general rules by which the boundaries of incorporated districts may be fixed in the first instance and by which additions thereto may subsequently be made. Dillon's Municipal Corporations, 3 ed., sec. 185.

The special instances in which the general legislative rules may be applied must of necessity be left to the municipal authorities of the city in question. Instances may occur in which both legislative and city council will violate fundamental rules, but the petition of the plaintiffs below, the defendants in error here, does not show any such case.

It is contended that the act in question, though general in its terms, is nevertheless special in point of fact, because at the time of its enactment there was and is yet but one city to which its provisions could apply. This does not make it a special law.

The judgment of the court below was wrong. It is reversed, with directions to sustain the demurrer to the petition.

All the justices concurring.

A true copy.
Attest:
[SEAL.]

J. W. MARTIN,
Clerk Supreme Court.

53 Endorsed: "1647. Filed February 13, 1899. C. W. Litchfield, clerk, by F. L. Kenny, deputy."

54 In the Court of Common Pleas of Wyandotte County, State of Kansas.

S. H. H. CLARK ET AL., Plaintiffs,
vs.
CITY OF KANSAS CITY, KANSAS, ET AL., Defendants.

Now comes the defendants, City of Kansas City, Benj. Schnierle, treas.; Leonard Daniels, clerk; The Board of Education of Kansas City, and move the court to spread the mandate of the supreme court upon the record, and that judgment be entered in accordance therewith.

T. A. POLLOCK,
City Counsellor.
F. D. HUTCHINGS,
City Attorney.

Endorsed: "No. 1647. (Caption.) Motion to spread mandate on record. Motion No. 4095. Filed February 13th, 1899. C. W. Litchfield, clerk."

55 In the Court of Common Pleas of Wyandotte County, Kansas.

S. H. H. CLARK ET AL., Plaintiffs,
vs.
THE CITY OF KANSAS CITY, KANSAS, ET AL., Defendants. } No. 1647.

Motion.

Come now the said defendants, The Township of Wyandotte of Wyandotte County, Kansas, and School District Number Nine (9) of the Township of Wyandotte or Wyandotte County, Kansas, and prays the court to set aside the default heretofore had against them in this action, and for leave to plead herein under such conditions as the court may deem just in the premises.

E. A. ENRIGHT,
Attorney for said Defendants, The Township of Wyandotte, Wyandotte County, Kansas, and School District Number Nine (9) of the Township of Wyandotte, —— County, Kansas.

Endorsed: "No. 1647. In the court of common pleas, Wyandotte Co., Ks. (Caption.) Motion. Filed Feb. 20th, 1899. C. W. Litchfield, clerk."

56 In the Court of Common Pleas of Wyandotte County, Kansas.

S. H. H. CLARK, OLIVER W. MINK, E. ELLERY ANDERSON, J. W. Doane, and F. R. Coudert, as Receivers of the Union Pacific Railway Company, Plaintiffs,
vs.
THE CITY OF KANSAS CITY, KANSAS; THE BOARD OF Education of the City of Kansas City, Kansas; M. G. McLean, as County Treasurer of Wyandotte County, Kansas; Charles E. Bruce, as County Clerk of Wyandotte County, Kansas; The Township of Wyandotte of Wyandotte County, Kansas, and School District Number Nine of Wyandotte County, Kansas, Defendants. } No. 1647.

Order.

Now, on this 20th day of February, 1899, this cause *coming* on for hearing upon the motion of the defendants The City of Kansas City, Kansas; Benjamin Schnierle, county treasurer, and Leonard C. Daniels, county clerk, and The Board of Education of the City of Kansas City, Kansas, to spread upon the record of this court the mandate of the supreme court, and to enter judgment in accord-

ance therewith, and the motion of the defendants The Township of Wyandotte of Wyandotte County, Kansas, and School District Number Nine (9) of Wyandotte County, Kansas, for leave to file answer to the plaintiffs' petition. The plaintiffs appeared by A. L. Williams, N. H. Loomis, and R. W. Blair, their attorneys. The defendants The City of Kansas City, Kansas; Benjamin Schnierle, Leonard C. Daniels, and The Board of Education of the City of Kansas City, Kansas, appeared by T. A. Pollock and F. D. Hutchings, their attorneys, and the defendants The Township of Wyandotte of Wyandotte County, Kansas, and School District Number Nine (9) of Wyandotte County, Kansas, appeared by their attorney, E. A. Enright; and the court, after hearing the argument of counsel and being fully advised in the premises, doth order and adjudge:

First. That the mandate of the supreme court be spread upon the record of this court.

Second. It is by the court further ordered and adjudged, in accordance with the mandate of the supreme court, that the judgment and every part thereof which was rendered by this court in
57 this cause on the third day of July, 1895, is wholly set aside and held for naught, to which the plaintiffs except.

Third. It is by the court further ordered and adjudged, in accordance with the mandate of the Supreme Court, that the demurrer to the petition of the plaintiffs of the defendants The City of Kansas City, Kansas; Benjamin Schnierle, county treasurer; Leonard C. Daniels, county clerk of Wyandotte county, Kansas, who has been substituted as a defendant for Charles E. Bruce, his predecessor in office, and The Board of Education of the City of Kansas City, Kansas, is sustained; to which the plaintiffs except.

Fourth. It is by the court further ordered and adjudged that the motion of the defendants The Township of Wyandotte of Wyandotte County, Kansas, and School District Number Nine (9) of Wyandotte County, Kansas, for leave to plead to the petition of the plaintiffs is overruled; to which plaintiffs and the defendants The Township of Wyandotte of Wyandotte County, Kansas, and School District Number Nine (9) of Wyandotte County, Kansas, except.

Fifth. It is by the court further ordered and adjudged that the defendant Leonard C. Daniels be, and he is hereby, permanently enjoined and restrained from extending upon the tax-rolls of Wyandotte county, Kansas, any tax levies of said defendant. The Township of Wyandotte of Wyandotte County, Kansas, and School District Number Nine (9) of Wyandotte County, Kansas, against the following-described lands of the Union Pacific Railway Company, to wit:

Commencing at the northeast corner of the southwest quarter (¼) of section fifteen (15), township eleven (11), range twenty-five (25) east, in Wyandotte county, Kansas, thence south forty (40) poles; thence east to the Kansas river; thence down the same to the prolongation of the east and west center line of said section fifteen (15); thence west to beginning.

Also commencing at the northeast corner of the southwest

quarter (¼) of section fifteen (15), township eleven (11), range
58 twenty-five (25) east, in Wyandotte county, Kansas, thence west to the center line of said section fifteen (15); thence north eighty (80) poles; thence west fifty-seven (57) poles; thence south to the southerly line of Fifth street, in the original town site of Armstrong; thence along the southerly line of Fifth street to its intersection with the southerly line of the Muncie boulevard; thence westerly along the southerly line of the Muncie boulevard to the west line of said section fifteen (15); thence south to the southwest corner of the southwest quarter (¼) of section fifteen (15); thence east eighty (80) poles; thence north fifty-two (52) poles; thence east eighty-five (85) poles; thence north twenty-eight (28) poles; thence east eight (8) poles; thence north one hundred ninety-nine (199) feet; thence east three hundred fifty-five and eight-tenths (355.8) feet to the east line of Third street, in McAlpine's addition; thence north one hundred sixty (160) feet; thence east two hundred seventy-five (275) feet to the center line of Second street, in McAlpine's addition, produced; thence north one hundred thirty (130) feet; thence east three hundred fifteen (315) feet to the prolongation of the center line of First street, in McAlpine's addition; thence north one hundred thirty-two and eight-tenths (132.8) feet; thence east to the east line of section fifteen (15); thence north forty (40) poles to the beginning.

Also commencing at a point where the northerly line of the Union Pacific Railway Company's right of way intersects the east line of section sixteen (16), township eleven (11), range twenty-five (25) east, in Wyandotte county, Kansas, thence northwesterly along said northerly line of the right of way of the Union Pacific railway to the west line of said section sixteen (16); thence south along the west line of said section sixteen (16) about one hundred (100) feet to the southerly line of the right of way of Union Pacific railway; thence southeasterly along the southerly line of said right of
59 way to the east line of said section sixteen (16); thence north about one hundred (100) feet to the beginning.

Said tracts being contiguous and containing in the aggregate one hundred seventy-two (172) acres.

To which the defendants The Township of Wyandotte of Wyandotte County, Kansas, and School District Number Nine (9) of Wyandotte County, Kansas, and the plaintiffs except.

Sixth. It is by the court further ordered and adjudged that the defendant Benjamin Schnierle and his successor in office be, and he is hereby, permanently enjoined and restrained from collecting the tax levies of said defendants, The Township of Wyandotte of Wyandotte County, Kansas, and School District Number Nine (9) of Wyandotte County, Kansas, against the said above-described lands of the Union Pacific Railway Company; to which the plaintiffs and the defendants The Township of Wyandotte of Wyandotte County, Kansas, and School District Number Nine (9) of Wyandotte County, Kansas, except.

Seventh. It is by the court further ordered and adjudged that the plaintiffs have and recover of and from the defendants The Town-

ship of Wyandotte of Wyandotte County, Kansas, and School District Number Nine (9) of Wyandotte County, Kansas, the amount of $2.50, their costs in this behalf expended; to which the plaintiffs and the defendants The Township of Wyandotte of Wyandotte County, Kansas, and School District Number Nine (9) of Wyandotte County, Kansas, except.

And the plaintiffs having announced in open court that they desired no order permitting them to file an amended petition, but would stand upon the allegations of their petition, it is by the court ordered and adjudged that the defendants The City of Kansas City, Kansas; Benjamin Schnierle, county treasurer, and Leonard C. Daniels, as county clerk, and The Board of Education of the City of Kansas City, Kansas, go hence without day and recover of and from the plaintiffs the amount of fifty-eight dollars and forty
60 cents ($58.40), their costs in this behalf expended; to which the plaintiffs except.

W. G. HOLT, *Judge.*

(Copy.)

STATE OF KANSAS, }
County of Wyandotte, } *ss:*

I, C. W. Litchfield, clerk of the court of common pleas for said county, do hereby certify that the foregoing is a full, true, and correct transcript of the record in the above-entitled cause.

In testimony whereof I have hereunto set my hand and seal this 20th day of February, A. D. 1899.

[SEAL.] C. W. LITCHFIELD, *Clerk.*

61 And also on the same day there was issued from the office of the clerk of the supreme court of the State of Kansas a summons in error, which, with the return of service and other endorsements thereon, is in words and figures as follows, to wit:

62 STATE OF KANSAS, *ss:*

Supreme Court.

The State of Kansas to the sheriff of Wyandotte county, Greeting:

You are hereby commanded to notify The City of Kansas City, Kansas; Board of Education of the City of Kansas City, Kansas; Township of Wyandotte of Wyandotte County, Kansas; School District No. 9 of Wyandotte County, Kansas; Benjamin Schnierle, as county treasurer of Wyandotte county, Kansas; Leonard C. Daniels, as successor in office of Charles E. Bruce and as county clerk of Wyandotte county, Kansas, defendants in error, that S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, as receivers of the Union Pacific Railway Company, plaintiffs in error, did on the 22nd day of February, A. D. 1899, file in the clerk's office of the supreme court of Kansas a petition in error and transcript of record, or case-made, the object of which is to obtain a reversal of a certain judgment rendered by

the court of common pleas sitting within and for the county of Wyandotte and State of Kansas in an action pending before said court wherein the said plaintiffs in error were plaintiffs and the said defendants in error were defendants.

63 You will make due return of this summons in error on or before the 6th day of March, A. D. 1899.

Witness my hand and the seal of the supreme court affixed hereto, at my office, in Topeka, this 23rd day of Feb., A. D. 1899.

[SEAL.]

JNO. MARTIN,
Clerk Supreme Court.
F. J. FRITCH, *Dep.*

(Endorsed:) 11392. Supreme court, State of Kansas. S. H. H. Clark *et al.*, receivers, etc., *vs.* The City of Kansas City *et al.* Summons in error. Issued Feb. 23rd, 1899. Returnable Mar. 6, 1899. Filed Feb. 27, 1899. Jno. Martin, clerk supreme court. A. L. Williams, attorney for pl'ff- in error.

STATE OF KANSAS, *County of Wyandotte,* } *ss:*

I received this summons in error on the 24th day of February, 1899, at ten o'clock a. m., and served the same on the 24 day of Feb'y, 1899, on the within-named defendants in error by delivering to F. D. Hutchings and E. A. Enright each personally, as attorneys of record for said defendants in error, a true copy of the

64 within summons in error.

W. LONGFELLOW, *Sheriff.*

Fees.

Service	.65
Copy	.50
Total	1.15

65 And afterwards, on the 23rd day of February, 1899, there was filed in the office of the clerk of the supreme court of the State of Kansas a bond for costs, which, with the approval thereof and other endorsements thereon, is in words and figures as follows, to wit:

66 In the Supreme Court of Kansas.

S. H. H. CLARK ET AL., as Receivers of the Union Pacific Railway Company, Plaintiffs in Error,
vs.
THE CITY OF KANSAS CITY, KANSAS, ET AL., Defendants in Error.

Security for Costs.

We and each of us enter as security for all costs which may accrue to said defendant- in error or to the officers of this court herein, and in default of payment by said plaintiff- in error of said costs and

after ten days' notice we agree that execution may issue against our property for unpaid costs.

J. R. MULVANE.

Endorsed: No. 11392. S. H. H. Clark *et al.*, receivers, etc., *vs.* The City of Kansas City, K., *et al.* Bond for costs. Approved and filed February 22nd, 1899. Jno. Martin, clerk supreme court. This bond is perfectly good. —— ——, attorney for plaintiff in error.

67 And thereafter, on the 1st day of March, there was filed in the office of the clerk of the supreme court of the State of Kansas a motion to advance said cause, which, with the endorsements thereon, is in the words and figures as follows, to wit:

68 In the Supreme Court of the State of Kansas.

S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, as Receivers of the Union Pacific Railway Company, Plaintiffs in Error, *vs.* The City of Kansas City, Kansas; The Board of Education of the City of Kansas City, Kansas; The Township of Wyandotte of Wyandotte County, Kansas; School District No. 9, Wyandotte County, Kansas; Benjamin Schmierle, as County Treasurer of Wyandotte County, Kansas; Leonard C. Daniels, as Successor in Office of Charles E. Bruce and as County Clerk of Wyandotte County, Kansas, Defendants in Error.	No. 11392. Motion to Advance.

Plaintiffs in error move the court to advance the above-entitled cause, and for reasons therefor say—

That this cause was brought in the court of common pleas of Wyandotte county, Kansas, for the purpose of enjoining the collection of certain tax levies of the city of Kansas City, Kansas, and of the board of education of the city of Kansas City, Kansas, extended against certain property of the Union Pacific Railway Company, plaintiffs claiming that the property was attempted to be taken into the city of Kansas City, Kansas, under and by virtue of an unconstitutional statute of the State of Kansas. The statute involved was chapter 74 of the Session Laws of Kansas for 1891, being an act entitled "An act relating to certain cities of the first class and the adding thereto certain adjoining territory."

The trial court held that the statute was in violation of the fourteenth amendment to the Constitution of the United States, and granted an injunction as prayed for by plaintiffs. The de-

69 fendants thereupon prosecuted a writ of error to this court.

This court reversed the decision of the lower court, and directed that defendants' demurrer to plaintiffs' petition be sustained

The decision of this court was rendered upon the 11th day of June, 1898. The opinion of the court is reported in 53 Pacific Reporter, page 468. After the decision of this court had been rendered Clark and others, as receivers, prosecuted a writ of error to the Supreme Court of the United States. That court held that the judgment of this court was not final and that the writ of error must be dismissed. The syllabus of the Supreme Court of the United States reads as follows:

"Where the statute of a State permits the amendment of a petition when a demurrer thereto has been sustained, the judgment of the supreme court of the State reversing the decision of the lower court overruling such a demurrer and directing that it be sustained is not a final judgment reviewable by the Supreme Court on writ of error."

The decision of the Supreme Court of the United States is reported in volume 19, Supreme Court Reporter, page 207.

After the mandate from the Supreme Court of the United States had been received in this court, a mandate was sent to the court of common pleas of Wyandotte county directing that the demurrer to plaintiffs' petition be sustained. The court of common pleas has acted upon that mandate and rendered final judgment in the case. Plaintiffs elected to stand upon their petition without making any amendment thereto. The case has again been filed in this court, and plaintiffs in error desire to submit it to the court at as early a date as possible, to the end that it may be refiled in the Supreme Court of the United States for the purpose of having the question involved decided upon its merits.

70 The only question which is involved in the case, so far as plaintiffs in error are concerned, is whether the statute in question is in violation of the fourteenth amendment to the Constitution of the United States.

Plaintiffs in error show to the court that the cause is one involving questions of a public interest, in this, to wit, if the contention of plaintiffs in error is correct, the township of Wyandotte and school district number 9 are entitled to collect their taxes against the disputed territory. If, on the contrary, the contention of plaintiffs in error is wrong and the statute is constitutional, then the city of Kansas City, Kansas, and the board of education of that city are entitled to those taxes.

It is also desirable to have settled as soon as possible the question as to whether the disputed territory is subject to the jurisdiction of the city of Kansas City, Kansas, whether offenses committed there are offenses against the ordinances of the city of Kansas City, Kansas, and whether the city has the power to exercise jurisdiction in other respects over the disputed territory.

A. L. WILLIAMS,
N. H. LOOMIS,
R. W. BLAIR,
Att'ys for Pl'ffs in Error.

(Endorsed:) 11392. Motion to advance cause. Filed Mar. 1, 1899. Jno. Martin, clerk supreme court.

71 And thereafter, on the 11th day of March, 1899, the same being one of the regular judicial days of the supreme court of the State of Kansas, said court being in session at its court-room, in the city of Topeka, there being present the Honorable Frank Doster, chief justice, and the Hon. William A. Johnston and the Honorable William R. Smith, associate justices, the following proceeding was had and remains of record, to wit:

72 *Journal Entry of Assignment.*

S. H. H. CLARK ET AL., Receivers, etc., Pl'ffs in Error,
vs.
CITY OF KANSAS CITY ET AL., Def'ts in Error. } No. 11392.

Now comes on for decision the motion of plaintiffs in error to advance this cause upon the dockets of this court for an early hearing and argument; and thereupon it is ordered that said motion be allowed, and that this cause be advanced to be heard at the April, 1899, session of this court and assigned for April 4th.

73 And thereafter, on the 29th day of March, 1899, there was filed in the office of the clerk of the supreme court proof of the service of the brief of the plaintiff in error, which, with the endorsements thereon, is in the words and figures as follows, to wit:

74 Service of this brief hereby acknowledge- this 18th day of March, 1899.

E. A. ENRIGHT,
Att'y for Wyandotte Township School District No. 9.

Filed March 29th, 1899.

JNO. MARTIN,
Clerk Supreme Court.

In the Supreme Court of the State of Kansas.

S. H. H. CLARK, OLIVER W. MINK, E. ELLERY ANDERSON, J. W. Doane, and F. R. Coudert, as Receivers of the Union Pacific Railway Company, Plaintiffs in Error,

vs.

THE CITY OF KANSAS CITY, KANSAS; THE BOARD OF Education of the City of Kansas City, Kansas; The Township of Wyandotte of Wyandotte County, Kansas; School District No. 9, Wyandotte County, Kansas; Benjamin Schmierle, as County Treasurer of Wyandotte County, Kansas; Leonard C. Daniels, as Successor in Office of Charles E. Bruce and as County Clerk of Wyandotte County, Kansas, Defendants in Error. } No. 11392.

Brief for plaintiffs in error.

A. L. WILLIAMS,
N. H. LOOMIS, AND
R. W. BLAIR,
Attorneys for Plaintiffs in Error.

75 And thereafter, on the 1st day of April, 1899, there was filed in the office of the clerk of the supreme court of the State of Kansas a motion to dismiss the appeal in this cause; which motion, with the endorsements thereon, is in the words and figures as follows, to wit:

76 In the Supreme Court of the State of Kansas.

S. H. CLARK, OLIVER W. MINK, E. ELLERY ANDERSON, J. W. Doane, and F. R. Coudert, as Receivers of the Union Pacific Railway Company, Plaintiffs in Error,

vs.

THE CITY OF KANSAS CITY, KANSAS; THE BOARD OF Education of the City of Kansas City, Kansas; The Township of Wyandotte of Wyandotte County, Kansas; School District No. 9, Wyandotte County, Kansas; Benjamin Schnierle, as County Treasurer of Wyandotte County, Kansas; Leonard C. Daniels, as Successor in Office of Charles E. Bruce and as County Clerk of Wyandotte County, Kansas, Defendants in Error. } No. 11392.

Motion to Dismiss Appeal.

Now comes The City of Kansas City, Kansas; The Board of Education of the City of Kansas City, Kansas; Benjamin Schnierle, as county treasurer of Wyandotte county, Kansas, and Leonard C. Daniels, as successor in office of Charles E. Bruce and as county clerk of Wyandotte county, Kansas, defendants in error in the above-entitled action, and move the court to dismiss the appeal of the plaintiffs in error on the following ground:

That this court has heretofore in this action, to wit, in case No. 10571, The City of Kansas City, Kansas, *et al.*, plaintiffs in error, *vs.* S. H. H. Clark *et al.*, defendants in error, in this court, and on the 11th day of June, 1898, said action being between the same parties as are plaintiffs and defendants in this action and upon the same pleadings and involving the same subject-matter and the same questions, and none other, duly ordered and adjudged that the petition of the plaintiffs in error in this case did not state facts
77 sufficient to constitute a cause of action, and did order and adjudge that the demurrer of the defendants named in this motion be sustained to said petition, in pursuance of which judgment the court of common pleas has heretofore entered an order sustaining said demurrer and rendering judgment in accordance with the mandate of this court, by reason of which judgment and proceedings all questions now presented in this case are *res adjudicata*.

T. A. POLLOCK,
City Counselor,
F. D. HUTCHINGS,
City Attorney,
Att'ys for Def'ts Named in This Motion.

(Endorsed:) No. 11392. S. H. H. Clark *et al. vs.* Kansas City. Motion to dismiss appeal by T. A. Pollock, F. D. Hutchings. Filed Apr. 1, 1899. Jno. Martin, clerk supreme court.

78 And thereafter, on the 4th day of April, there was filed in the office of the clerk of the supreme court of the State of Kansas notice of motion to dismiss, together with the proof of the service of said notice, which, with the endorsements thereon, is in the words and figures as follows, to wit:

79 In the Supreme Court of the State of Kansas.

S. H. H. CLARK, OLIVER W. MINK, E. ELLERY ANDERSON, J. W. DOANE, and F. R. COUDERT, as Receivers of the Union Pacific Railway Company, Plaintiffs in Error,

vs.

THE CITY OF KANSAS CITY, KANSAS; THE BOARD OF Education of the City of Kansas City, Kansas; The Township of Wyandotte of Wyandotte County, Kansas; School District No. 9, Wyandotte County *County*, Kansas; Benjamin Schmierle, as County Treasurer of Wyandotte County, Kansas; Leonard C. Daniels, as Successor in Office of Charles E. Bruce and as County Treasurer of Wyandotte County, Kansas, Defendants in Error. } No. 11392.

Notice.

To Hon. A. L. Williams, N. H. Loomis, and R. W. Blair, attorneys for the plaintiffs in error in the above entitled action:

You are hereby notified that the defendants in error named in the motion, a copy of which is annexed hereto, have filed said motion in the supreme court and will ask for a hearing thereof at the time of the hearing of this case.

You are further notified that affidavits and other evidence in support thereof will be offered on the hearing of the same.

T. A. POLLOCK,
City Counselor.
T. D. HUTCHINGS,
City Attorney.

80 Service of above notice acknowledged April 1, 1899.

A. L. WILLIAMS,
N. H. LOOMIS,
R. W. BLAIR,
Att'y. for Pl'ff. in Error.

(Endorsed:) #11392. Clark *et al. vs.* The City of Kansas City *et al.* Proof of service of notice of motion. Filed Apr. 4, 1899. Jno. Martin, clerk supreme court.

81 And also on the 4th day of April, 1899, the same being one of the regular judicial days of the supreme court of the

State of Kansas, said court being in session at its court-room, in the city of Topeka, there being present the Honorable Frank Doster, chief justice, and the Honorable William A. Johnston and the Honorable William R. Smith, associate justices of said court, the following proceeding was had and remains of record, to wit:

82 *Journal Entry of Continuance.*

S. H. H. CLARK ET AL., Rec's, etc., Pl'ffs in Error,
vs.
CITY OF KANSAS CITY ET AL., Def'ts in Error. } No. 11392.

On stipulation of counsel for both parties it is ordered that the further hearing of this cause be continued to Thursday, April 6th, 1899.

83 And also on the *on the* 6th day of April, 1899, there was filed in the office of the clerk of the supreme court of the State of Kansas the proof of service of the brief of plaintiffs in error, which, with the endorsements thereon, is in words and figures following, to wit:

84 Service of this brief hereby acknowledged this 18th day of March, 1899.

F. D. HUTCHINGS,
T. A. POLLOCK,
Att'ys for Defendant in Error Kansas City.

In the Supreme Court of the State of Kansas.

S. H. H. CLARK, OLIVER W. MINK, E. ELLERY ANDERSON, J. W. Doane, and F. R. Coudert, as Receivers of the Union Pacific Railway Company, Plaintiffs in Error,
vs.
THE CITY OF KANSAS CITY, KANSAS; THE BOARD OF Education of the City of Kansas City, Kansas; The Township of Wyandotte of Wyandotte County, Kansas; School District No. 9, Wyandotte County, Kansas; Benjamin Schnierle, as County Treasurer of Wyandotte County, Kansas; Leonard C. Daniels, as Successor in Office of Charles E. Bruce and as County Clerk of Wyandotte County, Kansas, Defendants in Error. } No. 11392

Brief for plaintiffs in error.

A. L. WILLIAMS,
N. H. LOOMIS, AND
R. W. BLAIR,
Attorneys for Plaintiffs in Error.

Filed Apr. 6th, 1899.

JNO. MARTIN,
Clerk Supreme Court.

85 And also on the 6th day of April, 1899, there was filed in the office of the clerk of the supreme court of the State of Kansas an answer to the motion of defendants in error to dismiss this appeal; which answer, with the endorsements thereon, is in words and figures as follows, to wit:

86 In the Supreme Court of the State of Kansas.

S. H. H. CLARK ET AL., Receivers, etc.,
vs.
THE CITY OF KANSAS CITY, KANSAS, ET AL. } No. 11392.

Answer of Plaintiffs in Error to the Motion of Defendants in Error to Dismiss This Appeal.

Now comes plaintiffs in error and say that they admit that the question sought to be presented by them under their various assignments of error herein, to wit, whether chapter 74 of the Session Laws of Kansas for 1891 is in conflict with the 14th amendment to the Constitution of the United States, has heretofore, in this action, in case numbered 10571 of this court, been passed upon by this court and decided adversely to plaintiffs in error; and plaintiffs in error say that a true copy of the opinion of this court upon that matter is set forth in the transcript from the court of common pleas of Wyandotte county filed herein.

Plaintiffs in error say that the brief of The City of Kansas City, Kan., *et al.*, who were plaintiffs in error in said case No. 10571, in which said opinion was rendered, contained the following statement:

"This is an injunction suit, and the only question involved in this proceeding in error is the constitutionality of chapter 74 of the Session Laws of Kansas for 1891, the same being an act entitled An act relating to certain cities of the first class and the adding thereto certain adjoining territory."

That the brief of S. H. H. Clark *et al.*, receivers, who were defendants in error in said case No. 10571, in which said decision
87 was rendered, contained the following statement:

"Plaintiffs in error correctly state in their brief that the only question involved in this case is the constitutionality of chapter 74 of the Session Laws of Kansas for 1891, the same being an act entitled An act relating to certain cities of the first class and the adding thereto certain adjoining territory."

Plaintiffs in error say, however, that after the decision of this court was rendered against them herein they took the case by writ of error to the Supreme Court of the United States; that that court dismissed their writ of error upon the sole ground that the judgment of this court was not such a final judgment as could be reviewed by the Supreme Court of the United States. The opinion of the Supreme Court of the United States on that appeal is reported in 172 U. S. Reports, page 334. The syllabus and opinion read as follows

CLARK ET AL.
v.
CITY OF KANSAS CITY, KAN., ET AL. } No. 402.

(JANUARY 3, 1899.)

Courts—Decision of State court—Finality of judgment—Review by Supreme Court—Where the statute of a State permits the amendment of a petition when a demurrer thereto has been sustained the judgment of the supreme court of the State reversing the decision of the lower court overruling such a demurrer and directing that it be sustained is not a final judgment reviewable by the supreme court on writ of error.

In error to the supreme court of the State of Kansas.

A. L. Williams, for plaintiffs in error; F. D. Hutchings and T. A. Pollock, for defendants in error.

Mr. Justice MCKENNA delivered the opinion of the court:

This is a writ of error to the supreme court of the State of Kansas to review a judgment of that court overruling a demurrer of the *nisi prius* court to the petition of plaintiffs in error for an
88 injunction to restrain the collection of taxes levied by the city of Kansas City on lands brought into that city under the act of the legislature of Kansas (Laws 1891, c. 74, sec. 1) authorizing cities of the first class, having a population of 30,000 or more, which shall be subdivided into lots and blocks, or whenever any unplatted tract of land shall lie upon or mainly within any such city, or is so situated as to be bounded on three-fourths of its boundary line by platted territory of or adjacent to such city, or by the boundary line of such city, or by both, the same may be added to and made a part of the city by ordinance duly passed. There was a provision in the law as follows; "But nothing in this act shall be taken or held to apply to any tract or tracts of land used for agricultural purposes when the same is not owned by any railroad or other corporation."

An ordinance was passed, pursuant to the statute, extending the city boundaries so as to include large tracts of land belonging to the Union Pacific railway. A portion of the lands were used for right of way and other railroad purposes, and a large part of them were vacant and unoccupied, which were held by the company for its future uses.

Taxes were levied by the city upon the property and the suit was brought to enjoin their collection. The petition presented the facts and contained the following allegation:

"Nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction equal protection of the laws."

And plaintiffs are advised, and so charge the fact to be, that in so far as said statute attempts to authorize the taking of said lands within the limits of Kansas City, Kansas, as attempted in said ordinance, Exhibit A, it is unconstitutional, null, and void, in this, to wit:

89 "That by reason of that portion of the act which excepts from its operation any tract or tracts of land used for agricultural purposes, when the same is not owned by any railroad or other corporation, it is in violation of that part of the fourteenth amendment to the Constitution of the United States which reads as follows: 'Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'"

The defendants other than The Township of Wyandotte and School District No. 9 filed a general*y* demurrer to the petition, which was overruled. The defendants The Township of Wyandotte and School District No. 9 did not plead in any way. The demurring defendants electing to stand upon their demurrer, a perpetual injunction was granted as prayed for against them. They appealed to the supreme court, where the judgment of the lower court was reversed (53 Pac., 468), and an order was made directing that court to sustain the demurrer.

The question of the constitutionality of the statute was presented to the supreme court of Kansas, and that court held that it violated neither the Federal nor State constitution. The same question is presented here in six assignments of errors. The specific contention is that the Kansas statute violates that portion of the fourteenth amendment which provides: "Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The defendants in error, however, object to the jurisdiction of this court, and urge that the judgment appealed from is not a final one, and is not therefore reviewable in this court.

It is further urged that the record does not show that anything was done in the lower court after decision in the supreme
90 court, but that error is prosecuted directly to the judgment of the supreme court, and that that determined only a question of pleading, and that its direction has not yet been acted on, and that no judgment of any kind has been entered against Wyandotte township or school district No. 9.

The law of Kansas prescribing action on demurrer is as follows: "If the demurrer be sustained, the adverse party may amend, if the defect can be remedied by way of amendment, with or without costs, as the court, in its discretion, shall direct."

In Brostwick *v.* Brinkerhoff, 106 U. S., 3; 1 Sup. Ct., 15, it was decided that "the rule is well settled and of long standing that a judgment or decree to be 'final' within the meaning of that term as used in the acts of Congress giving this court jurisdiction on appeals and writs of error must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here the court below would have nothing to do but to execute the judgment or decree it had already rendered," for the support of which many cases were cited; and, further, "If the judgment is not one which disposes of the whole case on its merits it is not final. Consequently, it has been uniformly held that a judgment of re-

versal, with leace for further proceedings in the court below, cannot be brought here on writ of error," also citing cases.

This case and those it cites have been applied many times, but we will confine our notice to instances of demurrer. De Armas *v.* U. S., 6 How., 103, was of this kind, but the grounds of demurrer urged there made the rule when applied to them not very disputable, and the case is not of much aid.

In Meagher *v.* Manufacturing Co., 145 U. S., 608; 12 Sup. Ct., 876, the demurrer was overruled with leave to answer over. Upon appeal to the Supreme Court the order overruling the de-
91 murrer was affirmed with costs. The rule of the Supreme Court provided that "upon the reversal, affirmance, or modification of any order or judgment of the district court by this court there will be a remittitur to the district court unless otherwise ordered;" held that the plaintiffs in error, upon the return of the case to the court, could plead over, and hence judgment was not final.

In Werner *v.* City Council, 151 U. S., 360; 14 Sup. Ct., 356, the announcement by the chief justice was: "The writ of error is dismissed. Meagher *v.* Manufacturing Co., 145 U. S., 608; 12 Sup. Ct., 876; Rice *vs.* Sanger, 144 U. S., 197; 12 Sup. Ct., 664; Hume *v.* Bowie, 148 U. S., 245; 13 Sup. Ct., 582."

The statement of the case shows that it was analogous to the case at bar. The motion to dismiss stated that:

"The judgment brought here by writ of error for review is a judgment of the supreme court of the State of South Carolina, which simply affirmed a decision of the lower court overruling a demurrer, and thereby remanded the case to the court below for a hearing on the merits. It is therefore an interlocutory judgment, and is in no sense a final decree.

"To this the plaintiff in error replied: 'The judgment brought here by writ of error for review is the judgment of the supreme court of the State of South Carolina holding that a certain act of the General Assemby of the State of South Carolina entitled "An act to authorize the city council of Charleston to fill up low lots and grounds in the city of Charleston in certain cases and for other purposes," approved on the 18th of December, 1830, is not in violation of the Constitution of the United States, thereby affirming the judgment of the trial court, and so ending the constitutional defense interposed by the plaintiff in error.'

"An examination of the record will show that the main
92 ground of the demurrer interposed in the court below by the plaintiff in error was the unconstitutionality of the act of 1830. It was claimed both there and in the court above, as well as in this court, to be in violation of due process of law."

Rice *v.* Sanger and Hume *v.* Bowie, cited by the chief justice, were not rulings on demurrer, and we have confined our notice to cases of that kind, not because they are separable in principle from the other cases decided, but to observe and explain the rule in its special application. That rule is, in its utmost generality, that no judgment is final which does not terminate the litigation between the parties

to the suit. If anything substantial remain to be done to this end, the judgment is not final. The law of the case upon the pleadings, and hence as presented by the demurrer, may be settled; but if power remain to make a new case, either by the direction of the supreme court or, in the absence of such direction, by the statutes of the State, the judgment is not final.

The statute of Kansas permitted such amendment, and the order of the supreme court did not take it away. Its order proceeds no further than a direction to sustain the demurrer to the petition. That done, the lower court had and had all of its power under the statute, and may exercise it at the invocation of plaintiffs in error. What they may be advised to do we cannot know. We can only consider their right and the power of the court. These existing, if we should affirm the judgment of the supreme court, that court, and maybe this court, may be called upon to determine other issues between the parties.

It follows from these views that the judgment of the supreme court is not final, and the writ of error must be dismisses, and it is so ordered.

93 Plaintiffs in error further say that thereafter a final judgment was rendered in this case by the court of common pleas of Wyandotte county, Kansas, as appears by the record herein, and that for the purpose of reviewing that final judgment they have brought the record thereof to this the highest court of the State — which the decision of the suit could be had, to the end that is this court decided to adhere to its former opinion and decision herein that the case might be taken to the Supreme Court of the United States for the purpose of having that court determine whether said statute is in conflict with the Constitution of the United States.

In view of all which plaintiffs in error respectfully submit that if this court adheres to its former opinion upon that question that the judgment of this court should be an affirmance of the judgment of the lower court and not a dismissal of this appeal.

A. L. WILLIAMS,
N. H. LOOMIS,
R. W. BLAIR,
Att'ys for Pl'ffs in Error.

STATE OF KANSAS, }
Shawnee County, } ss:

N. H. Loomis, of lawful age, being by me first duly sworn, says that he is one of the attorneys for pl'ffs in error herein; that he has read the foregoing answer of plaintiffs in error and knows the contents thereof, and that the statements of fact therein contained are true.

N. H. LOOMIS.

Subscribed and sworn to before me upon this 6th day of April, 1899.

FRANK E. SMITH,
Notary Public. [SEAL.]

94 Commission expires Feb. 27, 1902.

(Endorsed:) 11392. Answer of pl'ffs in error to motion of def'ts in error to dismiss appeal. Filed April 6, 1899. Jno. Martin, clerk supreme court, by F. J. Fritch, dep.

95 And also on the 6th day of April, 1899, the same being one of the regular judicial days of the supreme court of the State of Kansas, said court being in session at its court-room, in the city of Topeka, there being present the Honorable Frank Doster, the Honorable William A. Johnston, and the Honorable William R. Smith, associate justices of said court, the following proceeding was had and remains of record, to wit:

96 *Journal Entry of Judgment.*

S. H. H. CLARK, OLIVER W. MINK, E. ELLERY ANDERSON, J. W. DOANE, and F. R. COUDERT, as Receivers of the Union Pacific Railway Company, Plaintiffs in Error,

vs.

THE CITY OF KANSAS CITY, KANSAS; THE BOARD OF Education of the City of Kansas City, Kansas; The Township of Wyandotte of Wyandotte County, Kansas; School District No. 9, Wyandotte County, Kansas; Benjamin Schnierle, as County Treasurer of Wyandotte County, Kansas; Leonard C. Daniels, as Successor in Office of Charles E. Bruce and as County Clerk of Wyandotte County, Kansas, Defendants in Error. } No. 11392.

Upon this 6th day of April, 1899, this cause comes on for hearing upon the motion of certain defendants in error to dismiss the appeal of plaintiffs in error.

And it appearing that this court has heretofore in this action, to wit, in case number 10571, The City of Kansas City, Kansas, *et al.*, plaintiffs in error, *vs.* S. H. H. Clark *et al.*, defendants in error, in this court, and on the 11th day of June, 1898, said action being between the same parties as are plaintiffs in error and defendants in error in this action, and upon the same pleadings and involving the same subject-matter and the same question and none other, to wit, whether chapter 74 of the Session Laws of Kansas for 1891 is in conflict with the fourteenth amendment to the Federal Constitution, duly ordered and adjudged that the petition of plaintiffs in error in this case did not state facts sufficient to constitute a cause of action, and did order and adjudge that the demurrer of the defendants in error named in this action be sustained to said petition,

97 a copy of the opinion of this court in said case being included in and made a part of the record on this appeal, in pursuance of which decision and judgment in this court the court of common pleas of Wyandotte county, Kansas, has heretofore entered an order sustaining said demurrer, and has rendered a final judgment in accordance with the mandate and opinion of this court; and it appearing that the appeal from the decision of this court in said case

number 10571 to the Supreme Court of the United States was dismissed by that court upon the ground that the judgment appealed from was not a final one, and it further appearing that final judgment has since been entered herein, and that plaintiffs in error desire to appeal therefrom to the Supreme Court of the United States for the purpose of reviewing the decision of this court:

It is therefore ordered and adjudged, for the reasons given in said opinion, that the judgment of the court of common pleas of Wyandotte county be, and the same is hereby, affirmed.

It is by the court further considered, ordered, and adjudged that the defendants in error do have and recover of and from the plaintiffs in error their costs herein, taxed at twenty dollars; to which rulings and judgment of the court plaintiffs in error duly except.

Upon application of plaintiffs in error, and that there may be no question as to the opinion of this court heretofore rendered herein being a part of the record on this appeal, it is by the court ordered that the copy of said opinion included in and made a part of the transcript from the court of common pleas of Wyandotte county, Kansas, be, and the same *be* hereby, declared to be a part of the record of this court in this case.

It is by the court further ordered, upon application of plaintiffs in error, that the judgment of this court rendered in said
98 case number 10571 upon the 11th day of June, 1898, reversing the judgment of the lower court and directing that the demurrer to plaintiffs' petition be sustained, be, and the same is hereby, made a part of the record in this case, and the clerk of this court is hereby directed to make and attach to the record herein a certified copy of said judgment.

In the Supreme Court of the State of Kansas.

Be it remembered that on Saturday, the 11th day of June, 1899, before the supreme court of the State of Kansas, in session at its court-room, in the city of Topeka, the following proceeding was had and remains of record at page 437 of Journal "A A" of said court:

CITY OF KANSAS CITY ET AL., Pl'ffs in Error,
vs.
THE U. P. R'L'Y CO. ET AL., Def'ts in Error. } No. 10571.

This cause comes on for decision, and thereupon it is ordered and adjudged that the judgment of the court below be reversed and that this cause be remanded with directions to sustain the demurrer to the petition. It is further ordered that the defendants in error pay the costs of this case in this court, taxed at $25.60, and hereof let execution issue.

Witness my hand and the seal of the supreme court attached hereto, at my office, in Topeka, this 17th day of April, 1899.

[Seal Supreme Court, State of Kansas.]

JNO. MARTIN,
Clerk Supreme Court,
By F. J. FRITCH, *Deputy.*

99 And thereafter, on the 7th day of April, 1899, there was filed in the office of the clerk of the supreme court of the State of Kansas proof of the service of the brief of the defendants in error, which, with the endorsements thereon, is in the words and figures as follows, to wit:

100 STATE OF KANSAS, }
County of Wyandotte. }

Service of copy of within brief acknowledged.

A. L. WILLIAMS,
N. H. LOOMIS,
Att'ys for Pl'ff- in Error.

April 4th, 1899.

Filed April 7th, 1899.

JNO. MARTIN,
Clerk Supreme Court.

In the Supreme Court of the State of Kansas.

S. H. H. CLARK, OLIVER W. MINK, E. ELLERY ANDERSON, J. W. Doane, and F. R. Coudert, as Receivers of the Union Pacific Railway Company, Plaintiffs in Error,

vs.

THE CITY OF KANSAS CITY, KANSAS; THE BOARD OF Education of the City of Kansas City, Kansas; The Township of Wyandotte of Wyandotte County, Kansas; School District No. 9, Wyandotte County, Kansas; Benjamin Schnierle, as County Treasurer of Wyandotte County, Kansas; Leonard C. Daniels, as Successor in Office of Charles E. Bruce and as County Clerk of Wyandotte County, Kansas, Defendants in Error. } No. 11392.

Brief for defendants in error, The City of Kansas City, Kansas; The Board of Education of Kansas City, Kansas; Benjamin Schnierle, as county treasurer of Wyandotte county, Kansas, and Leonard C. Daniels, as county clerk of Wyandotte county, Kansas.

F. D. HUTCHINGS,
City Attorney.
T. A. POLLOCK,
City Counselor.

101 And thereafter, on the 11th day of April, 1899, there was filed in the office of the supreme court of the State of Kansas a petition for a writ of error, which, with the endorsements thereon, is in the words and figures as follows, to wit:

102 In the Supreme Court of the State of Kansas.

S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, as Receivers of the Union Pacific Railway Company, Plaintiffs in Error, *vs.* The City of Kansas City, Kansas; The Board of Education of the City of Kansas City, Kansas; The Township of Wyandotte of Wyandotte County, Kansas; School District No. 9, Wyandotte County, Kansas; Benjamin Schnierle, as County Treasurer of Wyandotte County, Kansas; Leonard C. Daniels, as Successor in Office of Charles E. Bruce and as County Clerk of Wyandotte County, Kansas, Defendants in Error.	No. 11392. Petition for Writ of Error.

Now come S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, as receivers of the Union Pacific Railway Company, plaintiffs in error herein, and say that on the 6th day of April, 1899, this court entered judgment herein in favor of the defendants in error and against these plaintiffs in error, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of these plaintiffs in error; all of which will more in detail appear from the assignment of errors which is filed with this petition in error.

Wherefore these plaintiffs in error pray that a writ of error may be allowed in this behalf to the Supreme Court of the United States for the correction of the errors complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to said Supreme Court of the United States.

A. L. WILLIAMS,
N. H. LOOMIS, &
R. W. BLAIR,
Attorneys for S. H. H. Clark et al., Plaintiffs in Error.

103 [Endorsed:] No. 11392. In the supreme court of the State of Kansas. S. H. H. Clark *et al.*, receivers of the Union Pacific Railway Company, plaintiffs in error, *vs.* The City of Kansas City, Kansas, *et al.*, defendants in error. Petition for writ of error. Filed Apr. 11, 1899. Jno. Martin, clerk supreme court. 1.

104 And also on the same day there was filed in the office of the clerk of the supreme court of the State of Kansas an assignment of errors, which, with the endorsements thereon, is in the words and figures as follows, to wit:

105 In the Supreme Court of the State of Kansas.

S. H. H. CLARK, OLIVER W. MINK, E. ELLERY Anderson, J. W. Doane, and F. R. Coudert, as Receivers of the Union Pacific Railway Company, Plaintiffs in Error,

vs.

THE CITY OF KANSAS CITY, KANSAS; THE BOARD of Education of the City of Kansas City, Kansas; The Township of Wyandotte of Wyandotte County, Kansas; School District No. 9, Wyandotte County, Kansas; Benjamin Schnierle, as County Treasurer of Wyandotte County, Kansas; Leonard C. Daniels, as Successor in Office of Charles E. Bruce and as County Clerk of Wyandotte County, Kansas, Defendants in Error.

Assignment of Errors.

S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, receivers of the Union Pacific Railway Company, plaintiffs in error herein, in connection with their petition for a writ of error, make the following assignment of errors which they aver appear in the record in this cause, to wit:

First.

The supreme court of the State of Kansas erred in affirming the judgment of the lower court.

Second.

The supreme court of the State of Kansas erred in failing and refusing to reverse the judgment of the lower court.

Third.

The supreme court of the State of Kansas erred in holding that these plaintiffs in error could not complain of the fact that chapter 74 of the Session Laws of Kansas for 1891, being an act entitled "An act relating to certain cities of the first class and the adding thereto certain adjoining territory," was in violation of that part of
106 the fourteenth amendment to the Federal Constitution which reads as follows: "Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Fourth.

The supreme court of the State of Kansas erred in failing and refusing to hold that chapter 74 of the Session Laws of Kansas for 1891, being an act entitled "An act relating to certain cities of the first class and the adding thereto certain adjoining territory," was in violation of that part of the fourteenth amendment to the Federal Constitution which reads as follows: "Nor shall any State deprive any person of life, liberty or property without due process

of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Fifth.

The supreme court of the State of Kansas erred in refusing to hold that the exception contained in chapter 74 of the Session Laws of Kansas for 1891, being an act entitled "An act relating to certain cities of the first class and the adding thereto certain adjoining territory," did not bring said act within the inhibition of that part of the fourteenth amendment to the Federal Constitution which reads as follows: "Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," the exception in said statute herein referred to being as follows:

"But nothing in this act shall be taken or held to apply to any tract or tracts of land used for agricultural purposes when the same is not owned by any railroad or other corporation."

107 Sixth.

The supreme court of the State of Kansas erred in holding that said chapter 74 of the Session Laws of Kansas for 1891, being an act entitled "An act relating to certain cities of the first class and the adding thereto certain adjoining territory," was and is valid in so far as these plaintiffs in error are concerned and binding upon them.

Seventh.

The supreme court of the State of Kansas erred in holding that the action of the city of Kansas City in taking within its limits the property of the Union Pacific Railway Company under the provisions of chapter 74 of the Session Laws of Kansas for 1891, being an act entitled "An act relating to certain cities of the first class and the adding thereto certain adjoining territory," was legal, and that the tax levies of said city extended against said property were valid.

A. L. WILLIAMS,
N. H. LOOMIS, &
R. W. BLAIR,

Attorneys for S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, Receivers of the Union Pacific Railway Company, Plaintiffs in Error.

108 [Endorsed:] No. 11392. In the supreme court of the State of Kansas. S. H. H. Clark *et al.*, receivers of the Union Pacific R'y Co., plaintiffs in error, *vs.* The City of Kansas City, Kansas, *et al.*, defendants in error. Assignment of errors. 2. Filed Apr. 11, 1899. Jno. Martin, clerk supreme court.

109 And also on said 11th day of April, 1899, there was filed in the office of the clerk of the supreme court of the State of Kansas a petition for reversal, which, with the endorsements thereon, is in the words and figures as follows, to wit:

110 In the Supreme Court of the United States.

S. H. H. CLARK, OLIVER W. MINK, E. ELLERY Anderson, J. W. Doane, and F. R. Coudert, as Receivers of the Union Pacific Railway Company, Plaintiffs in Error,

vs.

THE CITY OF KANSAS CITY, KANSAS; THE Board of Education of the City of Kansas City, Kansas; The Township of Wyandotte of Wyandotte County, Kansas; School District No. 9, Wyandotte County, Kansas; Benjamin Schnierle, as County Treasurer of Wyandotte County, Kansas; Leonard C. Daniels, as Successor in Office of Charles E. Bruce and as County Clerk of Wyandotte County, Kansas, Defendants in Error.

} Petition for Reversal.

S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, receivers of the Union Pacific Railway Company, in connection with their petition for a writ of error and their assignment of errors entitled and filed in this cause in the supreme court of the State of Kansas, pray that the said judgment rendered against them in the supreme court of the State of Kansas on the 6th day of April, 1899, may be reversed, annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by reason of such judgment.

A. L. WILLIAMS,
N. H. LOOMIS, &
R. W. BLAIR,

Attorneys for S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, Receivers of the Union Pacific Railway Company, Plaintiffs in Error.

111 [Endorsed:] In the Supreme Court of the United States. S. H. H. Clark *et al.*, receivers of the Union Pacific Railway Company, plaintiffs in error, *vs.* The City of Kansas City, Kansas, *et al.*, defendants in error. Petition for reversal. Filed Apr. 11, 1899. Jno. Martin, clerk supreme court. 3.

112 And also on said 11th day of April, 1899, the same being one of the regular judicial days of the January term of the supreme court of the State of Kansas, before the Honorable Frank Doster, chief justice, sitting at his chambers in the city of Topeka, the following proceeding is had and remains of record, to wit:

113 In the Supreme Court of the State of Kansas.

S. H. H. CLARK, OLIVER W. MINK, E. ELLERY ANDERSON, J. W. Doane, and F. R. Coudert, as Receivers of the Union Pacific Railway Company, Plaintiffs in Error,

vs.

THE CITY OF KANSAS CITY, KANSAS; THE BOARD OF EDUCATION of the City of Kansas City, Kansas; The Township of Wyandotte of Wyandotte County, Kansas; School District No. 9 of Wyandotte County, Kansas; Leonard C. Daniels, as Successor in Office of Charles E. Bruce and as County Treasurer of Wyandotte County, Kansas, Defendants in Error.

Journal Entry Allowing Writ of Error.

Upon this day come S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, receivers of the Union Pacific Railway Company, plaintiffs in error in the above-entitled cause, by A. L. Williams, their attorney, and present to the undersigned, chief justice of the supreme court of the State of Kansas, their petition herein, praying for the allowance of a writ of error in the above-entitled cause to the Supreme Court of the United States for the correction of certain errors complained of and more fully set forth in the assignment of errors accompanying said application for a writ of error.

Upon consideration whereof it is hereby ordered that the said petition be, and the same is hereby, granted and the said writ of error allowed. The said plaintiffs in error thereupon present their bond for costs on said writ of error in the sum of one thousand dollars, with P. I. Bonebrake, of Topeka, Kansas, and J. R.
114 Mulvane, of Topeka, Kansas, as sureties.

Upon consideration whereof the said bond and the sufficiency of the sureties thereupon is hereby approved by me.

FRANK DOSTER,
Chief Justice of the Supreme Court of the State of Kansas.

115 And also on the 11th day of April, 1899, there was filed in the office of the clerk of the supreme court of the State of Kansas a writ of error, which, with the allowance thereof by the Honorable Frank Doster, chief justice, endorsed thereon, and the endorsements thereon, is in words and figures as follows:

116 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Kansas, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between S. H. H. Clark, Oliver W. Mink,

E. Ellery Anderson, J. W. Doane, and F. R. Coudert, as receivers of the Union Pacific Railway Company, plaintiffs in error, and The City of Kansas City, Kansas; The Board of Education of the City of Kansas City, Kansas; The Township of Wyandotte of Wyandotte County, Kansas; School District No. 9, Wyandotte County, Kansas; Benjamin Schnierle, as county treasurer of Wyandotte County, Kansas; Leonard C. Daniels, as successor in office of Charles E. Bruce and as county clerk of Wyandotte county, Kansas, defendants in error, wherein there was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the right, title, privi-
117 lege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, as receivers of the Union Pacific Railway Company, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 11th day of April, in the year of our Lord one thousand eight hundred and ninety-nine.

[Seal of the Circuit Court of the United States, District of Kansas, 1862.]

GEO. F. SHARITT,
Clerk of the Circuit Court of the United States
for the District of Kansas.

Allowed by—

FRANK DOSTER,
Chief Justice of the Supreme Court
of the State of Kansas.

118 [Endorsed:] In the Supreme Court of the United States. S. H. H. Clark *et al.*, receivers of the Union Pacific Railway

Company, plaintiffs in error, *vs.* The City of Kansas City, Kansas, *et al.*, defendants in error. Writ of error. 5. Filed Apr. 11, 1899. Jno. Martin, clerk supreme court.

119 And also on the 11th day of April, 1899, there was filed in the office of the clerk of the supreme court of the State of Kansas a bond for costs, which, with the approval thereof by the Honorable Frank Doster, chief justice of said court, and with the endorsements thereon, is in words and figures as follows, to wit:

120 Know all men by these presents that we, P. I. Bonebrake and J. R. Mulvane, of Topeka, Shawnee county, Kansas, are held and firmly bound unto the City of Kansas City, Kansas; the Board of Education of the City of Kansas City, Kansas; the Township of Wyandotte of Wyandotte County, Kansas; School District No. 9, Wyandotte County, Kansas; Benjamin Schnierle, as county treasurer of Wyandotte county, Kansas; Leonard C. Daniels, as successor in office of Charles E. Bruce and as county clerk of Wyandotte county, Kansas, and each and every of them in the full and just sum of one thousand dollars ($1,000.00), to be paid to the said City of Kansas City, Kansas; the Township of Wyandotte of Wyandotte County, Kansas; School District No. 9, Wyandotte County, Kansas; Benjamin Schnierle, as county treasurer of Wyandotte county, Kansas; Leonard C. Daniels, as successor in office of Charles E. Bruce and as county clerk of Wyandotte county, Kansas, their successors, heirs, executors, administrators, and assigns and each and every of them; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Whereas, upon the 6th day of April, A. D. 1899, in a suit depending in the supreme court of the State of Kansas between S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, as receivers of the Union Pacific Railway Company, plaintiffs in error, and The City of Kansas City, Kansas; The Board of Education of the City of Kansas City, Kansas; The Township of Wyandotte of Wyandotte County, Kansas; School District No. 9, Wyandotte County, Kansas; Benjamin Schnierle, as county treasurer of Wyandotte county, Kansas; Leonard C. Daniels, as successor in office of Charles E. Bruce and as county clerk of Wyandotte county, Kansas, defendants in error, judgment was rendered against said plaintiffs in error, and said plaintiffs in error have obtained a writ of error in the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendants in error, citing and admonishing them to be and appear in the Supreme

121 Court of the United States, at the city of Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, receivers of the Union Pacific Railway Company, shall prosecute said writ of error to effect and answer all

costs if they fail to make good their plea, then the above obligation to be void; else to remain in full force and virtue.

Sealed with our hands and dated this 11th day of April, 1899.

P. I. BONEBRAKE.
J. R. MULVANE.

Approved by—

FRANK DOSTER,
Chief Justice of the Supreme Court of the State of Kansas.

122 [Endorsed:] In the supreme court of the State of Kansas. S. H. H. Clark *et al.*, receivers of the Union Pacific Railway Company, plaintiffs in error, *vs.* The City of Kansas City, Kansas, *et al.*, defendants in error. Cost bond. 7. Filed Apr. 11, 1899. Jno. Martin, clerk supreme court.

123 And afterwards on the 17th day of April, 1899, there was filed in the office of the clerk of the supreme court of the State of Kansas a citation, which, with the acknowledgement of service thereof endorsed thereon and proof of service attached thereto, is in words and figures as follows, to wit:

124 UNITED STATES OF AMERICA, *ss:*

To the City of Kansas City, Kansas; The Board of Education of the City of Kansas City, Kansas; The Township of Wyandotte of Wyandotte County, Kansas; School District No. 9, Wyandotte County, Kansas; Benjamin Schnierle, as county treasurer of Wyandotte county, Kansas; Leonard C. Daniels, as successor in office of Charles E. Bruce and as county clerk of Wyandotte county, Kansas, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Kansas, wherein you are defendants in error and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, receivers of the Union Pacific Railway Company, are plaintiffs in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Frank Doster, chief justice of the supreme court of the State of Kansas, this 11th day of April, 1899.

FRANK DOSTER,
Chief Justice of the Supreme Court of the State of Kansas.

125 Service of this citation hereby acknowledged upon this 12th day of April, A. D. 1899.

F. D. HUTCHINGS,
City Attorney,
T. A. POLLOCK,
City Counselor,
Attorneys for The City of Kansas City, Kansas; The Board of Education of the City of Kansas City, Kansas; Benjamin Schnierle, as County Treasurer of Wyandotte County, Kansas, and Leonard C. Daniels, as Successor in Office of Charles E. Bruce and as County Clerk of Wyandotte County, Kansas, Defendants in Error.

E. A. ENRIGHT,
Attorney for The Township of Wyandotte of Wyandotte County, Kansas, and School District Number Nine, Wyandotte County, Kansas, Defendants in Error.

126 [Endorsed:] 11392. In the supreme court of the State of Kansas. S. H. H. Clark *et al.*, receivers of the Union Pacific Railway Company, plaintiffs in error, *vs.* The City of Kansas City, Kansas, *et al.*, defendants in error. Citation. Filed Apr. 17, 1889. Jno. Martin, clerk supreme court. 6.

127 In the Supreme Court of the State of Kansas.

S. H. H. Clark et al., Receivers, etc., Pl'ffs in Error,
vs.
City of Kansas City et al., Def'ts in Error.
} No. 11392.

I, John Martin, clerk of the supreme court of the State of Kansas, do hereby certify that the above and foregoing is a full, correct, true, and complete transcript of all pleadings and papers filed and all proceedings had as the same remain now on file and of record in my office, and, in obedience to the command of the writ of error in said transcript set forth, I herewith transmit to the Supreme Court of the United States said transcript of the record and proceedings as above set forth, with all things concerning the same.

Seal Supreme Court, State of Kansas.

In witness whereof I hereto subscribe my name and affix the seal of the supreme court of the State of Kansas this 17th day of April, 1899.

JNO. MARTIN,
Clerk Supreme Court,
By F. J. FRITCH, *Dep.*

Endorsed on cover: File No. 17,375. Kansas supreme court. Term No., 790. S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, & F. R. Coudert, as receivers of the Union Pacific Railway Company, plaintiffs in error, *vs.* The City of Kansas City, Kansas; The Board of Education of the City of Kansas City, Kansas, *et al.* Filed April 21st, 1899.

No. 268.

Brief of Pierce & Williams for P. E.

268

No. 790.

Office Supreme Court U. S.
FILED
SEP 23 1899
JAMES H. MCKENNEY,
Clerk.

Filed Sept 23 1899

IN THE

United States Supreme Court.

S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane and F. R. Coudert, as Receivers of The Union Pacific Railway Company,
Plaintiffs in Error,

vs.

The City of Kansas City, Kansas, et al.,
Defendants in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF FOR PLAINTIFFS IN ERROR.

WINSLOW S. PIERCE,
A. L. WILLIAMS,
N. H. LOOMIS,
Attorneys for Plaintiffs in Error.

The Hall Lithographing Co., Printers, Topeka. 85021

IN THE

United States Supreme Court.

S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane and F. R. Coudert, as Receivers of The Union Pacific Railway Company,
Plaintiffs in Error,
vs.
The City of Kansas City, Kansas, et al.,
Defendants in Error.

No. 790
Oct. Term,
1898.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement of the Case.

Upon the tenth of March, 1891, the Legislature of Kansas passed an act authorizing cities of the first class to take certain property within their limits, and providing the method for so doing.

That act reads as follows (Chapter 74, Laws of 1891):

"CITIES OF THE FIRST CLASS.

"An act relating to certain cities of the first class, and the adding thereto certain adjoining territory.

"*Be it enacted by the Legislature of the State of Kansas.*

"Section 1. That whenever any territory adjoining or touching the city limits of any city of the first class having a population of 30,000 inhabitants or more shall be subdivided into lots and blocks, or whenever any unplatted tract of land shall lie upon or mainly within any such city, or is so situated as to be bounded on three-fourths of its boundary line by platted territory of or adjacent to such city, or by the boundary line of such city or by both, the same may be added to and made a part of the city by ordinance duly passed; which ordinance shall describe the territory by giving the name of the subdivision or addition as platted, and by giving the metes and bounds of such unplatted tract, or by giving the metes and bounds of each tract and plat so taken in separately, or of the entire tract or tracts so taken in, with the section, town, range and county in which the same is located, without further proceedings; *but nothing in this act shall be taken or held to apply to any tract or tracts of land used for agricultural purposes when the same is not owned by any railroad or other corporation.* Any other territory adjoining such city, whether platted or unplatted, may be added to and made a

part of the city in the following manner: The city attorney shall prepare an ordinance describing the territory to be added to and made a part of the city, giving the name of the owner, if known, and if the name of the owner is unknown, then the words 'owner unknown' shall follow such description. After such ordinance has been presented to the mayor and council, they shall fix a time not less than fifteen days nor more than thirty days from the date of the presentation of the ordinance when all parties affected by the passage of such ordinance may be heard before the mayor and council. After the time is fixed for such hearing, the city marshal shall serve a written or printed notice on all of the resident owners of unplatted territory embraced in such ordinance. Such notice shall be served by the city marshal in the same manner as a summons in a civil action before a justice of the peace. If any of the owners of any unplatted territory affected by such ordinance are non-residents of the county, or reside beyond the State, then the city clerk shall give notice by publication for ten days in some paper published in such city, and having a general circulation in the county in which said city is situated, giving a description of such unplatted tracts and a statement that they are included in such proposed ordinance, and stating when and where all parties interested may be heard. The first publication of said notice shall not be less than eight days, and the last publication thereof shall not be more than twenty-two days after the presentation of such ordinance. No notice whatever shall be necessary to the owners of platted territory. At any time after the expiration of thirty days, after the presentation of such ordinance, and after parties interested shall have opportunity to be heard as aforesaid, the mayor and council may

pass such ordinance, and cause the same to be published in the city official paper. Within thirty days after such publication the mayor of such city shall file in the office of the clerk of the district court of the county in which such city is situated a copy of said ordinance and the service of notices duly certified by the clerk of said city under the seal of the city, and also therewith due proof showing the publication of said ordinance. Thereupon said court shall consider said ordinance, and by its judgment either approve, disapprove or modify the same, first hearing all objections, if any, and proofs, if any, offered the said city or persons affected by said ordinance. Should said ordinance be approved or modified by said court, then the limits or area of said city shall be enlarged or extended as therein designated from the date of such approval or modification; but should it be disapproved entirely, then the limits or area of the city shall remain unaffected by said proceedings. But should the same be approved entirely, or modified or approved, the judgment of such court shall stand and the limits of such city shall be extended as in said judgment specified; and such judgment shall be final and conclusive upon all persons, companies and corporations, and in all courts, as to the limits or area of such city as thus enlarged or extended. The district court shall make a record of all findings and determinations in the premises, which shall be conclusive evidence of the facts so found and determined; and after the disapproval or modification of one ordinance, another or others may be passed and acted on in like manner and upon the notice.

"Sec. 2. That so much of section one of chapter ninety-nine of the Session Laws of 1887, relating to cities of the first class, and all other acts and parts of acts in so far as the same are in con-

flict with the provisions of this act, are hereby repealed.

"Sec. 3. This act shall take effect and be in force from and after its publication in the official State paper.

"Approved March 10, 1891.

"Published in the official State paper April 2, 1891."

On March 8, 1892, the city council of Kansas City, Kansas, in pursuance of the above statute, extended the city boundaries so as to include large tracts of land belonging to the Union Pacific Railway Company. A portion of those lands were used for right of way and other railroad purposes, and a large part of them were vacant and unoccupied lands held by the railway company for its future emergencies. The ordinance extending the city boundaries reads as follows (record, page 14):

"ORDINANCE No. 2163.

"An ordinance adding certain lands therein described known as the Union Pacific lands to and making the same a part of the city of Kansas City, Kansas.

"Whereas, A certain unplatted territory belonging to the Union Pacific Railroad Company lies upon and mainly within the city of Kansas City, Kansas, and is so situated as to be bounded on three-fourths ($\frac{3}{4}$) its boundary line by platted territory of, and adjoining to said city; which said railroad land, by virtue of its location, enjoys the

benefits of said city without sharing its burdens; now, therefore,

"*Be it ordained by the Mayor and Councilmen of The City of Kansas City, Kansas:*

"Section 1. That the following described territory, to wit: Commencing at the northeast corner of the southeast quarter ($\frac{1}{4}$) of section fifteen (15), township eleven (11), range twenty-five (25) east, in Wyandotte County, Kansas, thence south forty (40) poles, thence east to the Kansas river, thence down the same to the prolongation of the east and west center line of said section fifteen (15), thence west to beginning.

"Also commencing at the northeast corner of the southeast quarter ($\frac{1}{4}$) of section fifteen (15), township eleven (11), range twenty-five (25) east, in Wyandotte County, Kansas, thence west to the center line of said section fifteen (15), thence north eighty (80) poles, thence west fifty-seven (57) poles, thence south to the southerly line of Fifth Street in the original townsite of Armstrong, thence along the southerly line of Fifth Street to its intersection with the southerly line of Muncie boulevard, thence westerly along the southerly line of Muncie boulevard to the west line of said section fifteen (15), thence south to the southwest corner of the southwest quarter ($\frac{1}{4}$) of section fifteen (15), thence east eighty (80) poles, thence north fifty-two (52) poles, thence east eighty-five (85) poles, thence north twenty-eight (28) poles, thence east eight (8) poles, thence north one hundred ninety-nine (199) feet, thence east three hundred fifty-five and eight-tenths (355.8) feet to the east line of Third Street, in McAlpine's addition, thence north one hundred sixty (160) feet, thence east two hundred seventy-five (275) feet to the center line of Second Street in McAlpine's addi-

tion, produced, thence north one hundred thirty (130) feet, thence east three hundred fifteen (315) feet to the prolongation to the center line of First Street in McAlpine's addition, thence north one hundred thirty-two and eight-tenths (132.8) feet, thence east to the east line of said section fifteen (15) thence north forty (40) poles to beginning.

"Also commencing at a point where the northerly line of the Union Pacific Railway Company's right of way intersects the east line of section sixteen (16), township eleven (11), range twenty-five (25) east, in Wyandotte County, Kansas, thence northwesterly along said northerly line of the right of way of the Union Pacific Railway, to the west line of said section sixteen (16), thence south along the west line of said section sixteen (16), about one hundred (100) feet to the southerly line of the right of way of the Union Pacific Railway; thence southeasterly along the southerly line of said right of way to the east line of said section sixteen (16), thence north about one hundred (100) feet to the beginning.

"Said tracts being contiguous and containing in the aggregate one hundred and seventy-two (172) acres, be and hereby is added to and made a part of the city of Kansas City, Kansas.

"Section 2. This ordinance shall take effect and be in force from and after its passage and publication in the Kansas City Gazette.

"Passed in council March 8th, 1892.

William Albright, City Clerk.

"Approved March 11th, 1892.

Thomas F. Hannan, Mayor.

"Published March 11th, 1892."

After the passage of this ordinance the tax levies of the city were extended against the property

so attempted to be taken within its limits, and the receivers of the railway company brought this action for the purpose of enjoining their collection. The collection of the taxes was enjoined, upon the ground that the statute above referred to, under which the ordinance was passed taking the property into the city, was unconstitutional and void, in that it violated that portion of the Fourteenth Amendment to the Constitution of the United States, which provides:

"Nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It was also contended by the receivers of the railway company that the statute was unconstitutional, in that it was in conflict with certain provisions of the State Constitution, which contention is, of course, immaterial in this court. The conflict of the statute with the Constitution of the United States was directly raised in plaintiffs' petition (see record, page 7). The allegations of the petition in respect to this particular matter read as follows:

"And plaintiffs are advised, and so charge the fact to be, that in so far as said statute attempts to authorize the taking of said lands within the limits of Kansas City, Kansas, as attempted in said or-

dinance, exhibit 'A,' it is unconstitutional, null and void, in this, to wit:

"That by reason of that portion of the act which excepts from its operation any tract or tracts of land used for agricultural purposes, when the same is not owned by any railroad or other corporation, it is in violation of that part of the Fourteenth Amendment to the Constitution of the United States which reads as follows: 'Nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' "

The defendants filed a general demurrer to the petition of the receivers (see record, page 21). The demurrer was overruled, and the defendants electing to stand upon it, a perpetual injunction was granted in favor of the receivers as prayed for in the petition (see record, page 24). Thereupon the case was taken by the City of Kansas City, Kansas, and the other defendants in the lower court, to the Supreme Court of the State of Kansas, where the judgment of the lower court was reversed and an order made directing that court to sustain the demurrer to the petition. The only question presented to the Supreme Court of Kansas was as to the constitutionality of the statute. That court held that the law violated neither the Federal nor the State Constitution. The decision of the Supreme Court of Kansas is

reported in 59 Kan. 427. It may be found on page 29 of the record.

The Receivers of the Union Pacific Railway Company thereupon brought the case to this court on a writ of error.

This court held that the judgment of the Supreme Court of Kansas was not final and therefore not subject to review.

Clark vs. Kansas City, 172 U. S. 334.

After the mandate of this court was received by the Supreme Court of Kansas the case went back to the Court of Common Pleas of Wyandotte County with directions to sustain the demurrer to plaintiffs' petition (see record, page 27). A copy of the opinion of the State Supreme Court accompanied its mandate.

When the case reached the Court of Common Pleas, its former judgment was set aside and the plaintiffs having elected to stand upon their petition without making any amendment thereto, the demurrer to the petition was, on February 20, 1899, sustained, and final judgment entered (record, page 32).

The plaintiffs thereupon took the case on error, to the Supreme Court of Kansas, where, on April 6, 1899, the judgment of the lower court was

affirmed. The journal entry of the court's judgment may be found on page 48 of the record, and, omitting caption, reads as follows:

Journal Entry of Judgment in State Supreme Court.

"Upon this 6th day of April, 1899, this cause comes on for hearing upon the motion of certain defendants in error to dismiss the appeal of plaintiffs in error.

"And it appearing that this court has heretofore in this action, to wit, in case number 10,571, *The City of Kansas City, Kansas, et al., plaintiffs in error, vs. S. H. H. Clark et al., defendants in error*, in this court, and on the 11th day of June, 1898, said action being between the same parties as are plaintiffs in error and defendants in error in this action, and upon the same pleadings and involving the same subject-matter and the same question and none other, to wit, whether chapter 74 of the Session Laws of Kansas for 1891 is in conflict with the Fourteenth Amendment to the Federal Constitution, duly ordered and adjudged that the petition of plaintiffs in error in this case did not state facts sufficient to constitute a cause of action, and did order and adjudge that the demurrer of the defendants in error named in this action be sustained to said petition, a copy of the opinion of this court in said case being included in and made a part of the record on this appeal, in pursuance of which decision and judgment in this court the Court of Common Pleas of Wyandotte County, Kansas, has heretofore entered an order sustaining said demurrer, and has rendered a final judgment in accordance with the mandate and opinion of this court; and it appearing that the appeal from the decision of this court in said case number 10,571 to the Supreme Court

of the United States was dismissed by that court upon the ground that the judgment appealed from was not a final one, and it further appearing that final judgment has since been entered herein, and that plaintiffs in error desire to appeal therefrom to the Supreme Court of United States for the purpose of reviewing the decision of this court.

"It is therefore ordered and adjudged, for the reasons given in said opinion, that the judgment of the Court of Common Pleas of Wyandotte County be, and the same is hereby affirmed.

"It is by the Court further considered, ordered and adjudged that the defendants in error do have and recover of and from the plaintiffs in error their costs herein, taxed at twenty dollars; to which rulings and judgment of the Court plaintiffs in error duly except.

"Upon application of plaintiffs in error, and that there may be no question as to the opinion of this court heretofore rendered herein being a part of the record on this appeal, it is by the Court ordered that the copy of said opinion included in and made a part of the transcript from the Court of Common Pleas of Wyandotte County, Kansas, be, and the same is hereby declared to be a part of the record of this Court in this case.

"It is by the Court further ordered, upon application of plaintiffs in error, that the judgment of this court rendered in said case number 10,571 upon the 11th day of June, 1898, reversing the judgment of the lower court and directing that the demurrer to plaintiffs' petition be sustained, be, and the same is hereby made a part of the record in this case, and the clerk of this court is hereby directed to make and attach to the record herein a certified copy of said judgment."

It will thus be seen that the State Supreme Court decided the case upon the same grounds that it was decided upon in the former hearing and that the opinion of the court in the first hearing was made the opinion of the court in the last one and declared to be a part of the record in the case.

The Receivers of the Union Pacific Railway Company thereupon sued out a writ of error to this court, and present for consideration precisely the same question sought to be raised by them upon their former appeal, which is, as to whether the statute in question is in conflict with the Fourteenth Amendment to the Constitution of the United States. That question is directly raised by plaintiffs in error by their several assignments of error set out on pages 52 and 53 of the record. The same errors are assigned in this brief, and are as follows:

Errors Assigned.

First. The Supreme Court of the State of Kansas erred in affirming the judgment of the lower court.

Second. The Supreme Court of the State of Kansas erred in failing and refusing to reverse the judgment of the lower court.

Third. The Supreme Court of the State of Kansas erred in holding that these plaintiffs in error could not complain of the fact that chapter 74 of the Session Laws of Kansas for 1891, being an act entitled

"An act relating to certain cities of the first class and the adding thereto certain adjoining territory,"

was in violation of that part of the Fourteenth Amendment to the Federal Constitution, which reads as follows:

"Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Fourth. The Supreme Court of the State of Kansas erred in failing and refusing to hold that chapter 74 of the Session Laws of Kansas for 1891, being an act entitled

"An act relating to certain cities of the first class and the adding thereto certain adjoining territory,"

was in violation of that part of the Fourteenth Amendment to the Federal Constitution, which reads as follows:

"Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Fifth. The Supreme Court of the State of Kansas erred in refusing to hold that the exception contained in chapter 74 of the Session Laws of Kansas for 1891, being an act entitled

"An act relating to certain cities of the first class and the adding thereto certain adjoining territory,"

did not bring said act within the inhibition of that part of the Fourteenth Amendment to the Federal Constitution which reads as follows:

"Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,"

the exception in said statute herein referred to being as follows:

"But nothing in this act shall be taken or held to apply to any tract or tracts of land used for agricultural purposes when the same is not owned by any railroad or other corporation."

Sixth. The Supreme Court of the State of Kansas erred in holding that said chapter 74 of the Session Laws of Kansas for 1891, being an act entitled

"An act relating to certain cities of the first class, and the adding thereto certain adjoining territory,"

was and is valid in so far as these plaintiffs in error are concerned and binding upon them.

Seventh. The Supreme Court of the State of Kansas erred in holding that the action of the City of Kansas City, in taking within its limits the property of the Union Pacific Railway Company under the provisions of chapter 74 of the Session Laws of Kansas for 1891, being an act entitled

"An act relating to certain cities of the first class and the adding thereto certain adjoining territory,"

was legal, and that the tax levies of said city extended against said property were valid.

ARGUMENT.

Chapter 74 of the Session Laws of Kansas for 1891 is Unconstitutional and Void, for the Reason that it Arbitrarily Excludes from its Operation Agricultural Lands Owned by Individuals, and Includes all Other Classes of Property.

The act in question is vitiated by the exception found in the last part of section 15, as the same appears on page 339, volume 1, General Statutes of Kansas, 1897, which reads as follows:

"*But nothing in this act shall be taken or held to apply to any tract or tracts of land used for agricultural purposes, when the same is not owned by any railroad or other corporation.*"

This provision of the act means that agricultural lands, *when owned by individuals*, shall not be subject to its provisions.

The statute under consideration, therefore, divides property into two general classes, one of which is subject to its provisions and the other is not. In the one class comes agricultural lands owned by individuals. In the other class comes agricultural lands owned by corporations, lands used for manufacturing and railroad purposes, vacant lands held for speculative purposes; in short, all lands not included in the excepted class.

The law is void because it arbitrarily singles out agricultural lands *owned by individuals*, and exempts them from burdens imposed upon all other classes of property.

The discrimination thus made is obvious. A corporation owns a tract of land used for agricultural purposes, located in the vicinity of a city of the first class. This land is subject to the provisions of the act and may be taken within the confines of the city. An individual owns a tract of land used for agricultural purposes, located precisely similar to the tract owned by the corporation, but such land is not subject to the provisions of the act and can not be taken into the city. The

individual sells his land to the corporation and it becomes subject to the law. The corporation sells its land to the individual and the law no longer applies.

Again, an individual owns several hundred acres of land, situated near a city of the first class; it is vacant and unoccupied, and of such a character that it is not suitable for agricultural purposes. The owner holds it with the expectation that it may become valuable for manufacturing or other similar purposes. This land may be taken into the city. Another individual owns an acre of ground similarly situated, but used for agricultural purposes. His land can not be taken into the city.

Another illustration: John Jones owns a tract of land consisting of two hundred acres, located adjacent to a city of the first class, which is used in the manufacture of brick. He selected this spot because it was not included within the limits of the city and close enough thereto to enable him to successfully carry on his business. He has no desire to have his property incorporated within the limits of the city. In fact, if that should be done the added burdens of taxation would make it impossible for him to successfully carry on his brick business in that location, and he would be

compelled in self-protection to seek another situation. Under the provisions of the act in question, his property might be taken within the limits of the city by the mere passage of an ordinance, regardless of his protests. On the other hand, Peter Smith might own a small parcel of land similarly situated, of less than an acre in extent, upon which he raised a few vegetables each year, but his land could not be taken into the city under the act in question, simply because it was used for agricultural purposes.

A railroad company may also own large tracts of unoccupied land located in the neighborhood of a city of the first class. The land may be held in anticipation of the growing needs of the company. This property can be brought into the city over the protests of its owner, while a plat of ground 100 feet square used for agricultural purposes may remain outside.

It will be observed in connection with this matter that the discrimination against lands *not* used for agricultural purposes is as great as the discrimination against lands owned by corporations and *used* for agricultural purposes; the test being whether the land can, or can not be taken into the city, and as most of the lands in Kansas are used for

agricultural purposes and are generally owned by individuals, it follows that the lands affected by the act are probably much smaller in area than those excepted from its operation.

No good reason can be given for these discriminations. They result entirely from the exercise of arbitrary power upon the part of the Legislature.

The Discrimination is Substantial.

That the discrimination is substantial is apparent. Property located within the limits of a city is subject to additional taxation for the support of the city government; to special assessments for the construction of sewers and the paving of streets; to the law of eminent domain as exercised by cities of the first class, and to that portion of such law which provides for the assessment of damages and benefits for the purpose of opening and improving streets; to the various police regulations which may be imposed by a city, which may prevent the free use of one's property. For instance, a regulation such as exists in the city of Leavenworth, which prevents trains from running at a speed exceeding three miles per hour.

It is true that there are benefits which are supposed to flow from the location of property within the boundaries of a city, and many owners would

prefer to have their property located within rather than without a city. But the fact nevertheless remains that the bringing of a piece of real estate within the confines of a city carries with it onerous burdens which many property owners are anxious to avoid. The statute under consideration recognizes this fact by giving to owners of certain classes of property the right to protest against the annexation as well as the right to have the question as to whether the property shall be taken into the city judicially determined in the district court.

The Power of the Legislature to Make Classifications.

It is urged, however, that the exception made in favor of agricultural property owned by individuals does not make the act void, because the Legislature has the power to make classifications; that when an act applies equally to all persons or properties included within the various classifications made by it, the legislation is valid.

The Classification Must be Reasonable.

We concede that the Legislature has the power to make classifications and that it may have the power to classify the different kinds of property

which may be taken within the limits of a city; but such classification must be reasonable. It can not be purely arbitrary. For instance, the Legislature would have no right to say that all tracts of land owned by individuals named Jones could be taken within the limits of an adjoining city, but that this could not be done with tracts of land similarly situated and owned by individuals named Smith. The Legislature would have no power to authorize a city to collect a license tax from all redheaded men engaged in business within its limits, exempting at the same time men with different colored hair. This idea is very lucidly set forth by Mr. Justice Brewer in the case of *Gulf, etc., Rld. Co. vs. Ellis*, 165 U. S. 155, and we use his language:

"But it is said that it is not within the scope of the Fourteenth Amendment to withhold from States the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true, * * * yet it is equally true that such classification can not be made arbitrarily. The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions

which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.

"As well said by Black, J., in *State vs. Loomis*, 115 Missouri, 307, 314, in which a statute making it a misdemeanor for any corporation engaged in manufacturing or mining to issue in payment of the wages of its employés any order, check, etc., payable otherwise than in lawful money of the United States, unless negotiable and redeemable at its face value in cash or in goods and supplies at the option of the holder at the store or other place of business of the corporation, was held class legislation and void. 'Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations. Thus the Legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair. Such a classification for such a purpose would be arbitrary and a piece of legislative despotism and therefore not the law of the land.'

"In *Vanzant vs. Waddell*, 2 Yerger, 260, 270, Catron, J. (afterwards Mr. Justice Catron of this court), speaking for the Supreme Court of Tennessee, declared: 'Every partial or private law which directly proposes to destroy or affect indi-

vidual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law, by another.'

"In *Dibrell vs. Morris' Heirs*, Supreme Court of Tennessee, 15 S. W. Rep. 87, 95, Baxter, Special Judge, reviewing at some length cases of classification, closes the review with these words: 'We conclude, upon a review of the cases referred to above, that, whether a statute be public or private, general or special, in form, if it attempts to create distinctions and classifications between the citizens of this State, the basis of such classification must be natural and not arbitrary.' "

Judge Cooley's opinion upon this subject, as expressed in his work on Constitutional Limitations, page 393, is as follows:

"The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character, and restricting their rights, privileges or legal capacities in a manner before unknown to the law, could be sustained, notwithstanding its generality. Distinctions in these respects should be based upon some reason which renders them important—like the want of capacity in infants and insane persons; but if the Legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due

bounds of legislative power, even if it did not come in conflict with express constitutional provisions. The man or the class forbidden the acquisition or enjoyment of property in the manner permitted to the community at large would be deprived of *liberty* in particulars of primary importance to his or their 'pursuit of happiness.' "

The Classification Made, of Agricultural Lands Owned by Individuals, is Unreasonable and Arbitrary.

We may admit, for the sake of argument, that sufficient reasons exist to justify the Legislature in exempting lands used for agricultural purposes from statutes providing for the enlargement of city boundaries. Furthermore, that the discrimination in favor of agricultural lands in the act under consideration would have been perfectly valid provided all agricultural lands had been excepted. But the trouble with the exception is that it only includes agricultural lands owned by individuals. The Legislature saw no objections to including agricultural lands within the limits of a city of the first class. The act expressly provides that such lands may be taken within the limits of a city provided they are owned by corporations. It is only when the agricultural lands are owned by individuals that the exception ap-

plies. This demonstrates that the mere fact of the lands being used for agricultural purposes affords no good reason, in the estimation of the Legislature, for excluding them from cities of the first class.

How can the conclusion be avoided, then, that the classification sought to be made in favor of agricultural lands owned by individuals is a purely arbitrary one? It has no reasonable basis to stand upon. The Legislature might just as well have said that all land belonging to John Doe should be excepted from the provisions of the act, or that all tracts of land having a red school house in the southeast corner and a white church in the northwest corner should not be affected by it. As to whether the exception is to apply to agricultural lands, or not, depends upon the question of ownership. Individuals owning such lands are favored; corporations owning similar lands are discriminated against. Therefore, the classification sought to be made is arbitrary, and not within the constitutional power of the Legislature.

In the case of *Santa Clara County vs. Southern Pac. Ry. Co.*, 18 Federal Reporter, 385, opinion by Mr. Justice Field, a statute of the State of California was condemned because it distin-

guished between corporations and individuals as to the uniformity of taxation. In the course of the opinion (page 394), Justice Field used the following language, which we desire to adopt as a part of our argument in this connection:

"Instances of every day occurrence will show the effect of this discrimination in a clear light. A natural person and a railroad company own together a parcel of property in equal proportions, subject to a mortgage. In estimating the value of the undivided half belonging to the natural person, half of the amount of the mortgage is deducted. In estimating the value of the undivided half belonging to the railroad company, no part of the mortgage is deducted. *The discrimination is made against the company for no other reason than its ownership.* Take another instance: A natural person and a railroad company own tracts of land adjoining each other, of the same quantity, and of equal fertility and richness, both being subject to a mortgage. In the estimate of the value of the property belonging to the natural person the amount of the mortgage is deducted; in the estimate of the value of the property belonging to the railroad company the mortgage is not deducted. Of course, the valuation of the latter and consequent tax is proportionately increased, *and this discrimination is made solely because of the ownership of the property.* Should these two owners exchange their lands, the valuation made would change with the ownership. Should the railroad company sell its tract to an individual, the assessing officers would at once be bound to return a different valuation of the property as a basis for taxation. *Every one sees that the valuation has not in fact changed with the ownership, and*

therefore that the discrimination is made solely because a rule is adopted in the assessment of the property of one party different from that applied in the assessment of the property of the other, purely on account of its ownership. * *

"The principle which sanctions the elimination of one element in assessing the value of property held by one party, and takes it into consideration in assessing the value of property held by another party, would sanction the assessment of the property of one at less than its value—at a half or a quarter of it—and the property of another at more than its value—at double or treble of it—according to the will or caprice of the State. *Today railroad companies are under its ban, and the discrimination is against their property. Tomorrow it may be that other institutions will incur its displeasure.* If the property of railroad companies may be thus sought out and subjected to discriminating taxation, so, at the will of the State, by a change of its Constitution, may the property of churches, of universities, of asylums, of savings banks, of insurance companies, of rolling and flouring mill companies, of mining companies, indeed, of any corporate companies existing in the State. The principle which justifies such a discrimination in assessment and taxation, where one of the owners is a railroad corporation and the other a natural person, would also sustain it where both owners are natural persons. A mere change in the State Constitution would effect this if the Federal Constitution does not forbid it. *Any difference between the owners, whether of age, color, race or sex, which the State might designate, would be a sufficient reason for the discrimination.* It would be a singular comment upon the weakness and character of our republican institutions if the valuation and consequent taxation of prop-

erty could vary according as the owner is white, or black, or yellow, or old, or young, or male or female. A classification of values for taxation upon any such ground would be abhorrent to all notions of equality of right among men. Strangely, indeed, would the law sound in case it read that in the assessment and taxation of property a deduction should be made for mortgages thereon if the property be owned by white men or by old men, and not deducted if owned by black men or by young men; deducted if owned by landsmen, not deducted if owned by sailors; deducted if owned by married men, not deducted if owned by bachelors; deducted if owned by men doing business alone, not deducted if owned by men doing business in partnerships or other associations; deducted if owned by trading corporations, not deducted if owned by churches or universities, and so on, making a discrimination whenever there was any difference in the character or pursuit or condition of the owner. To levy taxes upon a valuation of property thus made is of the very essence of tyranny, and has never been done except by bad governments in evil times, exercising arbitrary and despotic power."

We contend that the discrimination made in favor of agricultural lands owned by individuals and against all other classes of property brings the act within the inhibition of the Federal Constitution, unless the discrimination was one which the Legislature was authorized to make; that the discrimination was not within the limits of the legislative discretion, because it is based entirely upon the question of the ownership of the property;

that whether property happens to be owned by a corporation or by an individual affords no proper basis for exempting that property from the operation of laws which affect all other classes of property similarly situated; therefore, as the discrimination was not a proper one, that the law is unconstitutional and void

"Due Process of Law" and "The Equal Protection of the Laws."

It was to prevent discriminations and class legislation that the latter part of the Fourteenth Amendment to the Federal Constitution was passed. The words "Due process of law," and "The equal protection of the laws," had for centuries possessed a well known signification which became a part of the Constitution. They are synonymous with "The law of the land." They mean a law binding upon every member of the community under similar circumstances (*Wally's Heirs vs. Kennedy*, 2 Yerg. 554). They were intended to secure the individual from the arbitrary exercise of the powers of the government, unrestrained by the established principles of private rights and distributive justice (*Bank vs. Okely*, 4 Wheat. 235). They condemn arbitrary,

unequal and partial legislation (*State vs. Loomis*, 115 Mo. 307; 22 S. W. 351). They meant not only that the means which the laws afford for such security shall be equally accessible to him, but that no one shall be subject to any greater burdens or charges than such as are imposed upon all others under like circumstances (Mr. Justice Field in *County of Santa Clara vs. Rld. Co.*, 18 Fed. Rep. 398). The Fourteenth Amendment "suffers no other or greater burdens or charges to be laid upon one than such as are equally borne by others" (*Ex parte Virginia*, 100 U. S. 339).

"The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic, or land, under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise odious individuals and corporations would be governed by one law, the mass of the community, and those who made the law, by another; whereas the like general law, affecting the whole community equally, could not have been passed. The idea of people, through their representatives, making laws whereby are swept away the life, liberty and property of one or a few citizens, by which neither the representatives nor their other constituents are willing to be bound, is too odious to be tolerated in any government where freedom

has a name. Such abuses resulted in the adoption of the Magna Charta in England, which is, and for centuries has been, the foundation of English liberty. Its infraction was a leading cause why we separated from that country, and its value as a fundamental rule for the protection of the citizen against legislative usurpation was the reason of its adoption as a part of our Constituion."

Judge Catron in *Wally vs. Kennedy*, 2 Yerg. 555, and *Vanzant vs. Waddell*, id. 270.

Cases in which Statutes have been Held Void on Account of Making Arbitrary and Unreasonable Classifications.

The cases in which discriminations are condemned and the statutes containing them declared unco stitutional are numerous, and we will call the attention of the court to some of them.

In the case of *Gulf, Colorado & Santa Fe Ry. vs. Ellis*, 165 U. S. 150, an act of the State of Texas providing for the assessment of attorneys' fees in suits against railroad companies, arising upon claims for stock killed or injured, was held to be unconstitutional in that it singled out railroad companies and required them to pay such fees without compelling other corporations and individuals to pay them under similar circumstances.

In the case of *Low vs. Rees*, 41 Neb. 127 (59 N.W. 362), an act of the Nebraska Legislature

fixing eight hours as a day's labor for all classes of mechanics, servants and laborers, excepting those engaged in farm or domestic labor, was declared unconstitutional, first, by reason of the exception made in favor of farm and domestic labor, and second, because it interfered with the right to contract.

In the case of *State vs. Loomis*, 115 Mo. 307 (22 S.W. 350), an act of the Missouri Legislature which declared that all corporations or individuals engaged in manufacturing or mining should pay their employés in cash or the equivalent thereof, was held unconstitutional for the reason that it related only to persons engaged in manufacturing or mining enterprises, and had no application to persons engaged in other classes of business.

In the case of *State vs. Goodwill*, 33 W. Va. 179 (10 S. E. 285), the Supreme Court of West Virginia held that it was not competent for the Legislature under the Constitution to single out owners and operators of mines and manufacturers of every kind, and provide that they should bear burdens not imposed on other owners of property or employers of labor, and prohibit them from making contracts which it was competent for

other owners of property or employers of labor to make.

In the case of *Millett vs. People*, 117 Ill. 294 (7 N. E. 631), the Supreme Court of Illinois stated that the question involved therein was this:

"The question is thus presented whether it is competent for the general assembly to single out owners and operators of coal mines as a distinct class and provide that they shall bear burdens not imposed on other owners of property or employers of laborers, and prohibit them from making contracts which it is competent for other owners of property or employers of laborers to make."

The court then proceeded to answer the question in the negative.

In the case of *O'Connell vs. Menominee Bay Shore Lumber Co.*, 71 N. W. 449, it was held by the Supreme Court of Michigan that a statute which permitted the service of process in certain classes of cases in counties adjoining the one in which the action was brought was invalid because class legislation, in that it gave special privileges to suitors on specified classes of claims.

In the case of *Coal Co. vs. Rosser*, 53 Ohio St. 12, it was held that a statute providing for an attorney's fee *in actions for wages* was unconstitutional and void as being class legislation.

In the case of *City of Tacoma vs. Krech*, 15

Wash. 296 (46 Pac. 255), an ordinance prohibiting barbers from working on Sunday was declared void upon the ground that barbers were singled out and other persons exempted from its provisions.

In the case of *Janesville vs. Carpenter*, 77 Wis. 288, a statute authorizing suits for injunction to be maintained in favor of certain parties, under circumstances differing from those which obtained in respect to all other suits of a similar nature, was held to be void as discriminating and class legislation.

In *Lewis vs. Webb*, 3 Greenl. 326, the validity of a statute granting an appeal from a decree of the probate court in a particular case came under review. The court says:

"On principle it can never be within the bounds of legitimate legislation to enact a special law, or pass a resolve dispensing with the general law in a particular case, and granting a privilege and indulgence to one man, by way of exemption from the operation and effect of such general law, leaving all other persons under its operation. Such a law is neither just nor reasonable in its consequences. It is our boast that we live under a government of laws, and not of men; but this can hardly be deemed a blessing, unless those laws have for their immovable basis the great principles of constitutional equality. Can it be supposed for a moment that if the Legislature should pass a

general law, and add a section by way of proviso that it never should be construed to have any operation or effect upon the persons, rights, or property of Archelaus Lewis or John Gordon, such a proviso would receive the sanction or even the countenance of a court of law? And how does the supposed case differ from the present? A resolve passed after the general law can produce only the same effect as such proviso. In fact, neither can have any legal operation."

See also:

South & North Alabama Rld. vs. Morris, 64 Ala. 193, 199.

Chicago, St. L., etc., Rld. vs. Moss, 60 Miss. 641.

Wilder vs. Rld. Co., 70 Mich. 382.

Grand Rapids Chair Co. vs. Runnels, 77 Mich. 104.

Jolliffe vs. Brown, 14 Wash. 155.

San Antonio, etc., Ry. Co. vs. Wilson, (Tex.) 19 S. W. 910.

Atchison & Nebraska Rld. Co. vs. Baty, 6 Neb. 37.

Eden vs. People, 161 Ill. 296.

Froer vs. People, 141 Ill. 171.

Pearson vs. Portland, 69 Me. 278.

Los Angeles Gold Mine Co. vs. Campbell, 56 Pac. (Colo.) 246.

The Decision of The Kansas Supreme Court.

The Supreme Court of Kansas held that the law was not in conflict with the Fourteenth Amendment, upon the ground, first, that the Legislature in passing laws providing for the addition of territory to cities of the first class had the right to discriminate between different classes of property and could exclude agricultural lands from the operation thereof, while including all the other classes of property "having to the city like relations of situation, contiguity and otherwise." Second, that the discrimination made between individuals and corporations as the owners of agricultural lands was one which could only be taken advantage of by corporations owning agricultural lands. Therefore, that the plaintiffs could not be heard to complain of such discrimination, because it was not alleged in the petition that the lands of the Union Pacific Railway Company were used for agricultural purposes. Let us consider the arguments of the court upon these propositions.

First. As to the discrimination made by the statute between different classes of property.

We do not assent to the view that the Legislature has the power to make general laws with

respect to extending the boundaries of cities, and to exclude from the operation of such laws lands used for agricultural purposes, without reference to their size or extent, when such lands are in all respects similar to lands affected by the law, with the single exception that they are used for agricultural purposes. Under this aspect of the law, as soon as the use of the land changes, the application of the law changes with it. A piece of land occupied today with a dozen families who are engaged in tilling it, is exempt from the provisions of the statute. Tomorrow the same piece of land is abandoned and becomes entirely unoccupied, is no longer devoted to agricultural purposes, and is at once brought within the purview of the law. We can not believe that such discrimination is justifiable. But, conceding that it is, and that the views of the learned Chief Justice of the Supreme Court of Kansas who delivered the opinion of the court are correct upon this subject, still he fails to meet the precise point in issue. That point is, not whether the Legislature can discriminate between agricultural lands and all other classes of property similarly situated, but whether it can discriminate between agricultural lands *owned by individuals* and all other classes of property.

The reasons which might justify the Legislature in excluding agricultural lands from the operation of the law do not apply when the act itself *includes* agricultural lands. If the Legislature had been actuated by the reasons offered by the Supreme Court of Kansas in support of the discrimination made, the act would have excluded from its operations *all* agricultural lands. Agricultural lands owned by corporations must come in. Agricultural lands owned by individuals may stay out. The mere fact that the lands are used for agricultural purposes affords no objection to their being taken into a city. The objection only arises when such lands are owned by individuals. Is such a discrimination valid? We insist that it is not, and that the owners of property discriminated against have the right to call to their aid the provisions of the Federal Constitution to protect themselves against a legislative enactment which refuses to them the equal protection of the laws, and which permits their property to be taken without due process of law.

Pursuing the subject further, let us take for illustration a legislative enactment declaring all public auditoriums or buildings where people congregate for amusement, instruction or religious

worship, to be subject to inspection and various regulations, and requiring the owners thereof to pay a tax to cover the expenses of such inspection and regulation. The act contains a proviso in the following language:

"But nothing in this act shall be taken or held to apply to public auditoriums or buildings used for religious worship, exclusively, when the same are the property of or used by the Methodist Episcopal Church."

Here would be an act in which the necessity of inspecting and regulating public auditoriums and churches, is recognized by the Legislature, and in which churches, as a whole, are placed in the same class, so far as inspecting and regulating them is concerned, as public halls and opera houses. But it is so framed as to except from its operation the churches of a certain denomination, thereby discriminating against all other public auditoriums and buildings included in the statute. Will it be contended that such a discrimination is valid as against the owner of an opera house?

For another illustration let us suppose that the Legislature has passed an act levying an income tax upon all residents of the State. The act contains the following proviso:

"But nothing in this act shall apply to individ-

uals having an income of less than $3,000 per year, when such person is not in the employ of a railroad or other corporation, or engaged in professional, manufacturing or mercantile pursuits."

This act is so drawn as to except persons engaged in agricultural pursuits and having an income of less than $3,000 per annum, from its operation. It excludes other classes also, as the language used is necessarily general in its nature; but it was essential to exempt farmers with a limited income from the provisions of the law, or it would not have passed the Legislature. In order to make the exception effective, it was put in the form of a proviso as above set forth. Can it be said that this law does not discriminate against *all* persons who under the terms of the law are obliged to pay the tax?

It is but a few steps from the foregoing instances to a law levying a tax for general State purposes but containing a proviso, similar in form to those given above, so worded as to exclude from the operation of the law all persons who voted the people's party ticket at the last general election.

If exceptions similar to the one under consideration are valid, then those contained in the foregoing illustrations are valid also, and there would

seem to be no limitation to the legislative will when it desires to except certain individuals or corporations, or classes of individuals or corporations, from the operation of laws passed by it. For it is certainly not a difficult matter to so frame an exception as to make it of the same character as the proviso contained in the act in question. And if such provisos are legal, it is possible for the Legislature not only to except certain individuals from the operation of obnoxious laws, but also makes it possible for laws to be so limited in their operation by provisos as to arbitrarily include within their scope unpopular individuals or business concerns only.

Second. As to the right of plaintiffs in error to avail themselves of the discrimination made in favor of agricultural lands owned by individuals, and against all other classes of property.

The Supreme Court of Kansas held that plaintiffs in error were not in a position to avail themselves of the unconstitutionality of the act caused by the discrimination made in favor of agricultural lands owned by individuals. In support of its position the court cites Cooley on Constitutional Limitations (6th ed.), page 196. The law is there stated to be as follows:

"A court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has, therefore, no interest in defeating it."

But in this case the rights of the Union Pacific Railway Company are affected by the act complained of. Its lands are sought to be taken within the limits of a city and subjected to its burdens under the provisions of the very statute which we say is unconstitutional. The argument of the lower court necessarily assumes that the statute is unconstitutional by reason of the exception made between individuals and corporations owning agricultural lands, and holds that the railway company can not raise the question as to the constitutionality of the statute because its lands are not agricultural lands.

Here we have the anomalous position of a party whose rights are injuriously affected by a statute confessedly void, but who is not permitted to even call the court's attention to the invalidity of the act. We have the case of a court enforcing, over a party's protest, the provisions of a law *which it concedes is not a law.*

The question first to be determined is, whether or not the law is in violation of the Federal Constitution. If it is, it is void and of no effect. If

it is a void law it should not be given effect by any court; it should not be enforced against any person. It would be strange, indeed, if a void law could be enforced as to some persons injuriously affected by it, and not enforced as to others.

To properly comprehend the logical results following from such a construction of the law, let us suppose a case: A railroad company owns a large tract of land in the vicinity of a city of the first class. It concludes to utilize a portion of the land for raising vegetables for use in its eating houses and dining cars. The land is accordingly fenced off and one part of it is used by the company for agricultural purposes and the other portion is allowed to remain vacant and unused, awaiting the time when it will be needed for side tracks and shops. An ordinance is passed taking both pieces of land into the city under the act in question. The railroad company enjoins the enforcement of the ordinance upon the ground that the statute upon which the ordinance is based is unconstitutional. The court holds that the law is unconstitutional, and that the railroad company can raise the question so far as it relates to the land used for agricultural purposes, but can not do so in so far as it relates to the land held by it for railroad

purposes. The court thereupon adjudges that the one piece of land is in the city and that the other is not. Would such a judgment be in accordance with common sense or legal principles?

Again, let us suppose a case in which the statute in question is declared unconstitutional for the reasons given in this brief, in a suit brought by a corporation owning land used for agricultural purposes, and thereafter an attempt should be made to enforce the law against lands used for other purposes. Could it be asserted with any degree of candor in such a case, that the owner of the land should not be permitted to plead the unconstitutionality of the act on the ground that he was not affected by it? If the unconstitutionality of the law can be raised in such a case by the owner of lands not used for agricultural purposes, why can it not be done in the case at bar?

It is useless to tell a person that he is not affected by a law which he knows is being enforced against him, and which he is compelled to obey.

The Supreme Court of Kansas holds that the party complaining must be affected by the *discrimination* as well as by the statute. But the property of the Union Pacific Railway Company

is affected by the discrimination as well as by the statute. Suppose the distinction had simply been made between property used for agricultural purposes on the one hand, and all other classes of property on the other. Waiving any question as to the validity of such a discrimination, can it be said that the owner of property used for railroad purposes would not be *affected* by it? In other words, if the discrimination in favor of agricultural lands made the statute unconstitutional, would not railroad lands be *affected* by the act so as to enable the owner thereof (within the doctrine of the Supreme Court of Kansas) to plead and rely upon its unconstitutionality? If that is so, what, if anything, is there to prevent the owner of railroad property from assailing the validity of an act which is unconstitutional, because of a discrimination made in favor of agricultural lands *owned by individuals*, and against all other classes of property?

A demonstration of the fact that property held or used for railroad purposes is affected by the discrimination, is afforded by considering the practical workings of this law as to the lands described in the first paragraph of the act. It starts out by describing, first, unplatted lands which lie

upon or mainly within a city of the first class; second, unplatted lands so situated as to be bounded on three-fourths of its boundary line by platted territory of or adjacent to said city, or by the boundary line of such city, or by both. Such lands may be taken into the city by the mere passage of an ordinance; provided, however, they do not happen to be owned by an individual and used for agricultural purposes. The lands of the railway company are included within those enumerated in the statute, and by ordinance duly passed are brought within the city. So far the conclusion can not be avoided that the lands of the Union Pacific Railway Company have been affected by the statute.

Let us go a little further. John Jones owns an unplatted tract of land which lies upon and mainly within the city of Kansas City. It is also so located as to be bounded on three-fourths of its boundary line by platted territory of that city, and by three-fourths of the boundary line thereof. The land is used for agricultural purposes. The city desires to include this tract of land within its boundaries, but can not do it. An examination of the statute reveals the fact that lands owned by an individual and used for agricultural purposes

are not affected by it. Here, then, is an exemption of the land owned by John Jones from the provisions of the statute. The lands of the railroad company are taken into the city. The land owned by John Jones, although located precisely similar to that of the railway company, can not be touched. Does not this amount to a discrimination in favor of John Jones and against the railway company? And can it be said that the railroad company is not *affected* by the discrimination?

The Clause Excepting Agricultural Lands Owned by Individuals Can Not be Rejected, Leaving the Statute to Stand Without It. The Whole Act Must Fall.

It may be claimed that the exception should be disregarded and thus permit the act to stand. This can not be done without making a law which it was not the intention of the Legislature to pass. The whole act is made dependent upon the idea that it was not to affect agricultural lands owned by individuals. The act never would have passed the Legislature if such lands had been included. The exception was undoubtedly in the shape of an amendment offered by some member

who was seeking to protect the property of himself and his fellow farmers. The probabilities are that an amendment of this nature, which is so much out of harmony with the balance of the act, would never have been accepted by the friends of the measure if they had not been compelled to do so. The, exception, however, is there, and is so connected with the whole statute as to be inseparable from it. This being so, the whole statute must fall.

In the case of *Spraigue vs. Thompson*, 118 U. S. 90, a decision was made involving this precise question. In that case it appears that the code of Georgia contained the following provision:

"Any person, master, or commander of a ship or vessel bearing toward any of the ports or harbors of this State, *except coasters in this state, and between the ports of this State and those of South Carolina, and between the ports of this State and those of Florida*, who refuses to receive a pilot on board, shall be liable, on his arrival in such port in this State, to pay the first pilot who may have offered his services outside the bar and exhibited his license as a pilot, if demanded by the master, the full rates of pilotage established by law for such vessel."

It was held by this court that this provision of the Georgia code was in conflict with the Constitution of the United States and that it was

annulled and abrogated by the provision in the Revised Statutes, section 4237, which provides that—

"No regulations or provisions shall be adopted by any State which shall make any discrimination in the rate of pilotage or half-pilotage between vessels sailing between the ports of one State and vessels sailing between the ports of different States, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States; and all existing regulations or provisions making any such discriminations are annulled and abrogated."

The Georgia statute was declared void because it excepted from its operations coasters in the State of Georgia and coasters between the ports of Georgia and those of South Carolina and between the ports of Georgia and those of Florida. It was held, however, by the Supeme Court of Georgia, in the same case of *Sprague vs. Thompson* that so much of the section as made these illegal exceptions might be disregarded, so that the rest of the section as thus read might stand, upon the principle that the separable part of the statute which is unconstitutional may be rejected and the remainder preserved and enforced. But in reference to this decision of the Supreme Court of Georgia, this court, through Mr. Justice Matthews, decided as follows:

"But the insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the Legislature of Georgia, the statute is made to enact what confessedly the Legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted in view of the illegality of the exceptions. We are, therefore, constrained to hold that the provisions of Sec. 1512 of the code of Geogia can not be separated so as to reject the unconstitutional exceptions merely, and that the whole section must be treated as annulled and abrogated by Sec. 4237 of the Revised Statutes."

In the case of *Pollock vs. Farmers Loan & Trust Co.* (Income Tax Case), 158 U. S. 601, it was held by this court that so much of the sections of the income tax law as laid a tax on income from real and personal property was unconstitutional. The court then proceeded to discuss the question as to whether these particular sections could be eliminated from the statute so that the balance of it might stand. In reference to that matter this court, through Mr. Chief Justice Fuller, stated the law to be as follows (page 635):

"It is elementary that the same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand, while that which is unconstitutional will be re-

jected. And in the case before us there is no question as to the validity of this act, except sections twenty-seven to thirty-seven, inclusive, which relate to the subject which has been under discussion; and as to them we think the rule laid down by Chief Justice Shaw in *Warren vs. Charlestown*, 2 Gray, 84, is applicable, that if the different parts 'are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the Legislature intended them as a whole, and that, if all could not be carried into effect, the Legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected must fall with them.' Or, as the point is put by Mr. Justice Matthews in *Poindexter vs. Greenhow*, 114 U. S. 270, 304: 'It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see, and to declare, that the intention of the Legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law intended by the Legislature one they may never have been willing by itself to enact."

An illustration of this same principle is found in the Trade Mark Cases, 100 U. S. 82, where an act of Congress, which, it was claimed, would have been valid as a regulation of commerce with foreign nations and among the States, was held

to be void altogether because it embraced all commerce, including that between the citizens of the same State, which was not within the jurisdiction of Congress, and its language could not be restrained to that which was subject to the control of Congress. "If we should," said the court in that case, page 99, "in the case before us undertake to make, by judicial construction, a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do."

See, also, opinion of Mr. Justice Brewer in case of *C. B. U. P. R. R. Co. vs. A. T. & S. F. R. Co.*, 28 Kan. 454.

Warren et al. vs. Mayor, etc., 2 Gray 84.

Slauson vs. City of Racine, 13 Wis. 398.

Cooley's Constitutional Limitations, page 179.

Mesheimer vs. The State, 11 Ind. 482.

The Right of the Union Pacific Railway Company to Hold Lands Used for Agricultural Purposes.

It was urged with considerable force, by adverse counsel in the court below, that the Union Pacific Railway Company had no authority to hold lands used for agricultural purposes; from which premise it was sought to deduce the conclusion that plain-

tiffs could by no possibility be injured by the discrimination made in the statute between the owners of agricultural lands. In view of the argument already made this point would not seem to be very material, but it is so far from being in accordance with the law that we can not refrain from calling the court's attention to its incorrectness. Any railroad company is liable to have a surplus of ground which it holds for the necessities of a growing business. There is no reason why the company may not lease these lands to be used for agricultural purposes. Even though the railroad company may be holding land more than it should, its title to the land can not be disturbed except in a direct proceeding brought at the instance of the State. As long as the State does not interfere, the railroad company has the right to permit the use of its surplus lands for agricultural purposes.

Conceding that railroad companies generally have no right to permit their surplus lands to be used for agricultural purposes under any circumsances, still this rule could not be held to apply to the Union Pacific Railway Company, for this reason: The Union Pacific Company was granted large tracts of land by the United States to aid in

the construction of its railroad; at the time this suit was commenced it still owned many acres of these lands. They were valuable, principally, for agricultural purposes. In the disposition and management of this property it was essential that the company not only permit but encourage their use for agricultural purposes. In most instances the title to the property sold remained in the railway company until the purchase price was fully paid. In many cases, after the property was sold, it reverted to the railway company by reason of a failure to pay balances due on the purchase price. The company would thereupon lease the land and improvements until another purchaser could be found. All of this must have been within the contemplation of Congress when the grant of lands was made to the railway company, and the company was necessarily endowed with the powers which were essential to carry the terms of the grant into effect. As was said by this Court in the case of *Platt vs. Union Pacific Railroad Company*, 99 U. S. 58:

"Railroad companies are not usually empowered to hold lands other than those needed for roadway and stations or water privileges. But when they are authorized to acquire and hold lands separate from their roads, the authority must in-

clude the ordinary incidents of ownership—the right to sell or to mortgage. Especially is this so when, as in the present case, the lands have been granted to the company by the Legislature that granted the charter, *without any restriction of their use.*"

Respectfully submitted.

WINSLOW S. PIERCE,

A. L. WILLIAMS,

N. H. LOOMIS,

Attorneys for Plaintiffs in Error

No. 268.

Brf. of Pollock & Hutchings for

Filed Oct. 20, 1899.

In the Supreme Court of the United States.

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JAMES H. McKENNEY,
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S. H. H. CLARK, OLIVER W. MINK, E. ELLERY ANDERSON, J. W. DOANE, AND F. R. COUDERT, as Receivers of the Union Pacific Railway Company,

Plaintiffs in Error,

vs.

THE CITY OF KANSAS CITY, KANSAS, et al.,

Defendants in Error.

268

No. ~~[illegible]~~ OCTOBER TERM, 1899.

BRIEF OF DEFENDANT IN ERROR, CITY.

F. D. HUTCHINGS,
City Attorney.

T. A. POLLOCK,
City Counselor

Attorneys for Defendant in Error.

THE LANE PRINTING CO., KANSAS CITY, KANSAS.

IN THE

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Defendants in Error.

No. 790. OCTOBER TERM, 1899.

BRIEF OF DEFENDANT IN ERROR, CITY.

Kansas City, Kansas, defendant in error, is a city of the first class, having a population of over 30,000. It was formed by a consolidation of three cities situated so that lines drawn connecting them form a triangle. Situated at a point almost in the center of this triangle, the Union Pacific Railway Company ownes three tracts of land, aggregating about 170 acres, used in part for

shops and other railway purposes and in part vacant. This land situated almost in the center of the city was attempted to be taken into the corporate limits in 1887. The company resisted and on appeal to the Supreme Court of Kansas it was held that under the then existing laws the city could not take the Union Pacific lands into the city against the protest of the company.

U. P. Ry. Co. vs. Kansas City, 42 Kansas, 497.

At the session of the Kansas legislature in 1891 the law given in full in the brief of plaintiff in error, page 2, was passed, providing a more satisfactory way for taking property into cities of the first class and repealing the former law, under which Kansas City had made its first attempt to incorporate the Union Pacific lands as part of the municipality. In 1892 Kansas City again attempted to take these same lands into the city, resulting in the instituting of the present suit, in the State Court, calling in question the law of 1891, both as being in conflict with the State and Federal Constitutions.

As far as the alleged conflict with the State Constitution is concerned, that question of course was eliminated from the case by the decision of the Kansas Supreme Court. So that the one question now left is whether the paragraph in the law of 1891 reading:

"but nothing in this act shall be taken or held to apply to any tract or tracts of land used for agricultural purposes when the same is not owned by any railroad or other corporation," vitiates the entire law by reason of making it in conflict with the Fourteenth amendment to the Federal Constitution forbidding a state to deny "to any person within its jurisdictions the equal protection of the laws," or "to deprive him of his property without due process of law."

ARGUMENT.

It is our contention in the first place that the decision of the Supreme Court of Kansas under the facts in this case does not involve a federal question and therefore is not reviewable by this court.

Second, if the court is of the opinion that there is a federal question involved, then it is our contention that the part of the law under consideration which it is claimed is repugnant to the constitution, can be separated from the unobjectional part and can be disregarded and the remaining portion of the law can be enforced in accordance with the true intent of the legislature in enacting the same.

Third: There being no allegations in the plaintiffs in error's petition filed in the *nisi prius* court of any pay-

ment or offer to pay the taxes admitted to be due, defendant in error contends that said plaintiffs in error were not in a position to maintain this suit and the demurrer to their petition was properly sustained for that reason.

The decision of the Supreme Court of Kansas does not involve a federal question and this Court therefore does not have jurisdiction to review the same.

As to our first contention, we desire to urge two reasons why it should be sustained. First, because the plaintiffs in error, not being affected by the only provision of the law under consideration to which any objection, as to its constitutionality, is made can not be heard to complain, as the law so far as they are concerned does not take any of their property without due process or deny them the equal protection of the law. And second, because the decision of the Supreme Court of Kansas was the mere construction of a State Statute, which was the exclusive province of that court. Said construction being such that as to the plaintiffs in error no provision of the federal constitution was infringed.

Plaintiffs in Error are not in a Position to Question the Constitutionality of the Law Under Consideration.

"One claiming that a state statute is void for want of due process of law, is limited solely to the inquiry whether in the case presented by himself, the statute has operated to deprive him of his property without due process; and the court will not consider whether, in a different case, the act might so operate." Del Castillo vs. McConnico, 168 U. S., 674; 18 S. Ct. Rep., 229.

The Supreme Court of Kansas in the opinion rendered in this case says:

"The contention of the defendants in error, (plaintiffs in error here) was that the act providing for the extension of the city boundaries discriminates between classes of real estate owners and is therefore violative of that part of the fourteenth amendment to the Constitution of the United States which prohibits the State from depriving persons of property without due process of law, or denying to persons within their jurisdiction the equal protection of the law. This contention is based upon the exemption forming the last clause of the statute quoted: "But nothing in this act shall be taken or held to apply to any tract or tracts of land used for agricultural purposes when the same is not owned by any railroad or other corporation." So far as this statute discriminates between classes of owners of agricultural lands, the defendants in error can not be heard to complain.

Their lands are not agricultural lands; at least they do not allege them to be such lands, but, on the contrary, allege that part of them are used for railroad purposes, and that the remaining portions are vacant and unoccupied lands, and possessed for railroad purposes. Owning no agricultural lands, the defendants in error are not effected by the discrimination which the statute make between the different classes of owners of such kinds of lands, and they cannot therefore be heard to complain on that score.

"A court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not effect, and who has no interest therefore in defeating it." Cooley's Constitutional Limitation, 6 ed. 196."

The plaintiff's in error have failed to bring to the attention of the Court any authority that controverts the law as laid down by the Kansas Supreme court in the above quotation. They, however, contend that the railroad company is effected by the law although its lands are not used for agricultural purposes, because it is sought to take them into the city under what they claim is conceded by the court, to be a void law.

Instead of the lower Court conceding that the law is unconstitutional by its decision it certainly decides exactly the contrary. The Court at least inferentially

holds that the portion of the law against which plaintiffs in error complain, is separable from the remainder of the law and that the unobjectionable part can and should be enforced. Of this, however, we desire to speak hereafter. The decisions are numerous in which the principles laid down by the Supreme Court of Kansas are upheld. In the case of Lowndes County vs. Hunter, 49 Ala., 507-509. The clerk of the Court brought suit against the county to recover for his services in completing certain records that former clerks had left uncompleted. The county defended on the grounds that a certain provision of the law that gave to the county a right of action on the delinquent clerks bound for the amount it may have to pay the present clerk for his work, was unconstitutional. The Court says:

"In the view we took of the case it is not necessary for us to express an opinion on the validity of the clause of the statute authorizing suit on the bond of the officers whose delinquency resulted in subjecting the county to liability for the completion of records which he ought to have completed. Neither the right and duty of the appelled nor the liberality of the appellant, is deducted from that clause. The concision of its unconstitutionality would not vitiate the proceeding, part of the statute rendering it the duty of the clerk to

complete the records, and making his compensation a county charge."

In another case, Smith vs. Inge, 80 Ala., 283-286, where a suit as brought by the Superintendent of wharves an officer of the Port of Mobile against several parties to eject them from certain premises claimed as wharf property, it was claimed that certain acts of the legislature desolving the municipal corporation of Mobile and creating the Port of Mobile was unconstitutional, because they took away all legal remedies from the creditors of the municipality for the collection of their debts, and that consequently an officer of the port of Mobile had no standing so as to maintain the suit in question. The Court in disallowing this contention, says:

"It is contended, however, that the acts of February 11, 1879, and December 8, 1880, including the whole system of legislation abolishing the charter and dissolving the municipal corporation of Mobile, are enactments which are void for repugnancy to the constitution because they impair the obligations of existing contracts by destroying all remedies of creditors of the city for the enforcement of their demands. It is manifest that this objection can be raised only by some actual creditor whose rights are claimed to be invalid. The defendants in this case are not shown to be credi-

tors and as to them the enactments in question are entirely free from constitutional objections."

In the case of People vs Rensselear and Saratoga Railroad Company, 15 Wendell, 113-130. A suit had been brought in the name of the State against the Railroad Company to compel it to show cause why it was doing certain things in the construction of a bridge that was claimed obstructed a navigable river. The Court says:

"The People of New York are plaintiffs in this case, and by this proceeding have called upon the defendants to show, by what authority they assume to do certain acts. It would in ordinary cases, be sufficient for the defendants to show that their acts are authorized by the authority of the law and of plaintiffs. Such an answer is sufficient in this case; and the defendants can only be properly called upon to answer to some person or persons entitled by a license to navigate the river to compensate in damages for obstructing the navigation or by some proceeding on the part of such persons to abate the nuisance if the bridge is such."

In another case, State vs. Clarke, 54 Mo., 17-36, the city of St. Louis had passed a certain ordinance authorizing the licensing of bawdy houses and a person holding such a license had been arrested under the State law and had in defence of the charge introduced

their city license. The State had objected to this, among other reasons, because the ordinance of the city providing for this license contained provisions that it was claimed infringed the State Constitution. The Court in answer to this says:

"If there are provisions in this ordinance, Chap. 14, which infringe on the rights of citizens, male or female, protected by the constitution and laws of the State, and such provisions are attempted to be enforced, the remedy is obvious. But even according to the case referred to in 1 Gray, it is not pretended that unconstitutional provisions in a law make it totally void. On the contrary, it is well settled, that they do not, and that a law may well stand, so far as it is constitutional, although it has in it certain provisions which are not valid. And in this case the only question was, whether the defendant's license under the ordinance was a protection. No question concerning the medical examination provided for in certain sections of the ordinance, arose.

No complaint on this subject was made by any one affected by the provisions said to be oppressive and in opposition to our bill of rights."

In the case of Pittsburg C. C. and St. L. Railroad Company vs. Montgomery, 49 N. E. Rept., 582-587, the constitutionality of an employer's liability act was under consideration. The act made all corporations except municipal liable for the negligence of a co-em-

ployee. The Supreme Court of Indiana held the law good as to railroads on the strength of the decisions of this court in the cases of Railway Company vs. Mackey, 127 U. S., 205, and Railway Company vs. Herrick, 127 U. S., 210, but it was urged that the law must fall because other corporations whose business was not as hazardous as railroading were included, the hazardousness of the business being the principal reason why the law as to railroads was sustained, and also because municipal corporations were excepted. The Court in its opinion dispose of these objections as follows:

"Objection is made to validity of the act because it embraces all corporations except municipal, and that there are other corporations whose business may be such as not to afford any reasonable ground for their classification, in that their business may not be peculiarly dangerous to life or limb, like that of railroads. To this it may be answered, if the act is valid as to railroad companies, the appellant railroad corporation, cannot be premitted to litigate the constitutionality of the act as to other corporations. Henderson vs. State, 13 Ind., 552; 36 N. E. 257. Board v. Reeves, 148 Ind., 467; 46 N. E., 995. Currier v. Elliott, 141 Ind., 394; 39 N. E., 554. It will be time enough to decide its validity as to other corporations when any of them come before this court with a case presenting the question.

It is also urged, as an objection to the validity of the

act, that it exempts municipal corporations from its operation. But no reason has been suggested why municipal corporations should be classed with railroad corporations. We have many statutes applying to railroad corporations that do not apply to municipal corporations. There is no necessary similarity between them. Nor is the business of municipal corporations so peculiarly hazardous to their employes as to call for such special legislation as is called for in case of railroad corporations to protect their employes. We therefore conclude that the act does not violate the constitution, either federal or state."

There are numerous other decisions and citations from text books that enunciate the same doctrine but these are sufficient to show that the principle laid down by the Supreme Court of Kansas is of wide acceptance.

The Construction placed of a State Statute by the Supreme Court of Kansas is Binding on this Court and Cannot be Reviewed.

As to our second contention under this branch of the law, the Supreme Court of Kansas in construing the statute of 1891 holds that the portion of the act alleged (see page 6 of record) to be in conflict with the constitution of the United States, is severable from the rest of the act. That the plaintiffs in error cannot question the validity of the whole act because the case they present does not come within the terms of the one portion

Since the printing of our brief the following cases have come to our attention:

"No one can take advantage of an unconstitutional provision of a law who has no interest in it and is not affected by it."

State *vs.* McNulty, 73 Mo., 87.
Jones *vs.* Black, 48 Ala., 540.
Board of Com'rs *vs.* Reeves, 148 Ind., 467.

of the law, which they challenge in their petition and assignments of error as unconstitutional. The plaintiffs in error are complaining of the construction placed by the Supremt Court of Kansas on the law in this case. The construction so placed on the statute in question is final, and this court will not review or reverse it, even if it is not correct. The correctness of our contention is best shown by the decisions of this court in similar cases.

In the case of St. Paul, Minneapolis & Manitoba Rly. Co. vs. Todd County, 142 U. S., 282, it was held that a decision of the Supreme Court of the state, exempting the property of a railway company from taxation, *but deciding that a certain class of property did not come within the terms of exemption*, is not an impairment of the contract by the laws of the state, and is not subject to review on error in the Supreme Court of the United States. In the opinion in this case by Mr. Chief Justice Fuller, it said:

"It is conceded the Supreme Court of Minnesota did not base its decision on the ground that there was not a valid contract between the state and the company, exempting its property from taxation, but held that the exemption claimed did not attach to these lands, and it is argued that if such lands are within the contract of exemption contained in the company's charter, then the obligation of that contract was impaired by the

assessment under chapter 11 of the general laws of the state, and the decision of the Supreme Court holding that the lands were subject to assessments under such laws. Our jurisdiction cannot be maintained upon this view, as is stated by Mr. Justice Gray speaking for the court in New Orleans Water Works Company vs. Louisiana Sugar Refining Company, 125 U. S., 30.

"'In order to come within the provisions of the Constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of the contract be impaired, but it must have been impaired by a law of the state, the prohibition is aimed at the legislative power of the state and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals, and the language of Mr. Justice Miller in exposition of the rule is quoted from two opinions of the court delivered by him."

"It must be the constitution or some law of the state which impairs the obligation of the contract, or which is otherwise in conflict with the Constitution of the United States, *and the decision of the state court must sustain the law in the matter in which the conflict is supposed to exist*, or the case for this court does not arise."

In the case of Central Land Company vs. Laidley, 159 U. S., 103, it is decided that this court has no jurisdiction of a writ of error to a state court on the ground

that the obligation of a contract has been impaired when the validity of the statute, under which the contract was made, is admitted, and the only question is of its construction by that court.

In this case Justice Gray, delivering the opinion of the court, said:

"The power delegated to us, is for the restraint of unconstitutional legislation by the states, and not for the correction of alleged errors committed by their judiciary."

In Winona & St. Peter Land Company vs. Minnesota, 159 U. S., 526, in which the opinion was delivered by Justice Brewer, it was claimed that the provisions of Ch. 5 of the Laws of Minnesota of 1881, providing for the collection of back taxes, were void, the defendant complained of taxes levied against its real estate, and argued that the provisions of the law in question, relative to the collection of unpaid taxes on personal property were void as being in conflict with the Constitution of the United States, and that the provision of the law relative to the collection of unpaid taxes on real property were also void. The Supreme Court of Minnesota held that the provision of the statute with reference to the real and personal property were separable, and that the provision of the statute, with refer-

ence to real property were valid, and could be enforced even though the provisions of the statute, with reference to personal property, were void. In the opinion it is said:

"The Supreme Court of the state was of the opinion that even if the tax on personal property was not collectable under the provisions of the tax law for the reason claimed, yet there was at least a valid tax which, in the absence of any law providing another method, might be enforced by an ordinary personal action. * * * "

"It may well be that the legislature, in view of the probabilities of the changes in the title or situs of personal property, might deem it unwise to charge it with back taxes, while at the same time, by reason of the stationary character of real estate, it might elect to proceed against that. *At any rate if it did so, it violates no provision of the federal constitution, and whether it did so or not was a matter to be determined finally by the Supreme Court of the state.*

In Noble vs. Mitchell, 164 U. S., 367, the court had occasion to consider a statute of the State of Alabama regulating the subject of fire and marine insurance within the state. The state court held that the provisions with reference to this subject were separable, and that construing the different laws of the state regulating the business of insurance by foreign corpora-

tions, and that so construed there was no conflict between the statute and the Constitution of the United States. In the opinion, on page 371, it is said:

"The action below was predicated upon the fact that the business of insurance had been done by foreign corporations, the Supreme Court of Alabama in interpreting the statute held the provision as to foreign corporations was distinct and separable from those concerning associations or partnerships. It said: 'It is contended, however, by Secs. 1207 of the code, *supra*, these provisions of the law are made to include associations and partnerships as well as corporations, and in this respect discriminates against citizens of any state who may compose such partnerships, and in this respect is violative of the constitutional provision which declares that the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states.'

"We construe Sec. 1207 as amendatory of the sections to which it refers, so as to substitute the words corporations, associations or partnerships, for the words insurance company. Thus considered Sec. 1205, *supra*, would read as follows: any person who solicits insurance on behalf of the corporation or partnership not incorporated by the laws of this state, etc., and Sec. 1206, *supra*, would read: any person acting as agent for any foreign corporation, association or partnership which have, etc.' "

"By holding Sec. 1207 as amendatory of the other sections referred to in a manner declaring Secs. 1205

The question as to whether the provisions of the statute were separable was presented to and considered by the supreme court of Kansas in passing upon the demurrer to the plaintiff's petition on the first appeal, and was not open for review on this appeal.

"Questions which were open to dispute, and which were either expressly or by necessary implication decided on the first appeal of a cause, are not open for review on a second appeal."

McKinney *vs.* State, 117 Ind., 26.
Crockett *vs.* Gray, 31 Kans., 346.
Headley *vs.* Challiss, 15 Kans., 602.
Central Branch U. P. R. R. Co. *vs.* Shoup, 28 Kans., 394.
Jones Stationery & Paper Co. *vs.* Western News Co., 30 Kans., 334; *id.*, 150.
Humphrey *vs.* Baker, 103 U. S., 736.
Brown *vs.* Pontiac Min. Co, 67 N. W., 546.
Oregon R'y & Navigation Co. *vs.* ——, 1 Wash., 195.
Fenton *vs.* Salt Lake Co, 7 Pac., 409.
Stump *vs.* Hornback, 109 Mo., 272.
Cramer *vs.* Stone, 38 Wis., 259–262.
Ferguson *vs.* Smith, 104 Ind., 246.

and 1206 are separable in their provisions, and so far as they are made to apply to and are enforced against foreign corporations, they do not contravene any provisions of the state Constitution or the Constitution of the United States. *This construction of the Alabama statute, although made by the Supreme Court of that state, is erroneous, and we are invited to disregard it but the interpretation of a statute of the state of Alabama by the Supreme Court thereof, under the circumstances here presented, is binding on us.*"

If the Court Decides that there is a Federal Question Involved in the Decision of the Kansas Supreme Court the Alleged Unconstitutional part of the Kansas Statute can be Disregarded and the Unobjectional part Enforced.

Plaintiffs in error claim that the classification made by the Kansas statute puts lands used for agricultural purposes and owned by individuals in one class and all other lands in another, permitting the latter class to be taken into a city and refusing to permit the former. The section of the statute in question reads as follows:

Section 1. That whenever any territory adjoining or touching the city limits of any city of the first class

having a population of 30,000 inhabitants or more shall be subdivided into lots and blocks or whenever any unplatted tract of land shall lie upon or mainly within any such city, or is so situated to be bounded on three fourths of its boundary line by platted territory of or adjacent to such city, or by the boundary line of such city or by both, the same may be added to and made a part of the city by ordinance duly passed; which ordinance shall describe the territory by giving the name of the subdivision or addition as platted, and by giving the metes and bounds of such unplatted tract, by giving the metes and bounds of each tract and plat so taken in separately, or of the entire tract or tracts so taken in, with the section, town, range and county in which the same is located, without further proceedings; BUT NOTHING IN THIS ACT SHALL BE TAKEN OR HELD TO APPLY TO ANY TRACT OR TRACTS OF LAND USED FOR AGRICULTURAL PURPOSES WHEN THE SAME IS NOT OWNED BY ANY RAILROAD OR OTHER CORPORATION."

It is plain from this section that the intent of the legislature was to divide lands into two classes, those used for agricultural purposes and those not so used and the last sentence, "WHEN THE SAME IS NOT OWNED BY ANY RAILROAD OR OTHER CORPORATION," is added by way of an exception from the class used for agricultural purposes, and was probably added as an amendment after the law had been prepared. If this exception was stricken out all the objections urged against

the law by plaintiffs in error would virtually be removed.

The right of the legislature to clasify the lands which are to be taken into the city and to say that certain classes of lands should be taken in, and that certain other classes should not, is not disputed. The only restriction is that the classification must be reasonable, and not arbitrary, but based on some difference as stated by Mr. Justice Brewer in Rld. Co. vs. Ellis, 165 U. S., 65, which bears "a reasonable and just relation to the act in respect to which the classification is proposed." The classification in this case of all lands used for agricultural purposes in one class and all other lands in another is not arbitrary, but on the contrary is certainly based on reasonable grounds. The benefits which accrue to lands within the limits of a city, are such that they would be of no value whatever, to lands used for agricultural purposes. Police protection, access thereto by means of graded and paved streets, the benefit of street lights or city water are of absolutely no value to lands used for agricurtural purposes, while the increase in taxation which all those conveniences of modern city life necessitates, would be an almost insupportable burden to the owner of such lands.

It is urged that the same objection would obtain as well to vacant lands, but practically this is not so. It is

a matter of common knowledge that vacant lands situated with reference to large cities, as those which would be affected by the terms of the law of 1891, are chiefly valuable on account of their proximity to such a city, and the possibility or probability that they will become available as city property. The fact that such lands have the benefit of all these modern conveniences would enhance their value. In addition to this, from the standpoint of the City, vacant and unoccupied lands might become a rendezvous of tramps and vicious characters generally, and if situated within the limits of an incorporated city, and yet not a part of it, the police would be absolutely powerless to make arrests or in any way prevent the establishment of this nuisance in its very midst. There are as good reasons why lands on which manufacturing plants are situated, necessitating the gathering together of large numbers of men and the construction of large buildings where fires are liable to orginate, demanding the assistance of the fire department maintained by the city, if for no other reason, to prevent the spread to the adjacent property in the city. This is peculiarly well illustrated by the facts in this case. The Union Pacific shops and round houses consisting of several large buildings and its switch yards filled with cars are in the heart of the city, and liable at any time to call on the city for fire

protection. The Company's hundreds of employees are furnished easy access to the Company's property by the bridges, viaducts, and paved streets in its immediate vicinity and all are maintained by the city, but the company pays no part of the expense of maintaining the city government and is in no way subject to the city regulations for protection against fire or for the maintenance of order. These and many other reasons of a similar nature might have moved the legislature to have excepted agricultural lands and included vacant and all other classes of lands.

It is quite possible that some inequalities and hardships will result from this classification, but that would be so in any classification of which we could conceive. Mr. Justice McKenna in a very recent case, Magoun vs. Illinois Trust & Savings Bank, 170 U. S., 283, 18 Sup. Ct. Reporter, 598, says:

"There is therefore no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And, necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things."

Is the classification as made by the Kansas Legislature, into lands used for agricultural purposes in one class and all others in another, so unreasonable, so un-

just and so arbitrary, that the court can say that the State of Kansas denies to any person the equal protection of the law? If the legislature had the right and has not offended against the fourteenth amendment by so classifying lands, then the law of 1891 can stand providing the last clause excepting from the classification of lands used for agricultural purposes, when owned by railroads or other corporations, is not so connected with and dependent on the other parts of the law as a condition, consideration or compensation, that it can be held bad and the other provisions enforced.

The Supreme Court of Kansas held, at least by inference, that this clause from the law of 1891, quoted above might be objectionable, yet, the Union Pacific Railway Company, its lands not being used for agricultural purposes, was in no way affected by this objectionable part and was therefore not in a position to raise the question of its constitutionality. In other words, that the objectionable part might be rejected and the remainder of the law enforced. Whether this could be done, to a great extent, depends upon the legislative intent. To illustrate, if the excepting of lands used for agricultural purposes when owned by railroads or other corporations from the general class of agricultural lands, which cities of the first class are not

permitted to take into the city limits by said law of 1891 was largely instrumental in the passage of, and intimately associated with the entire act as an inducement therefor; then the law would have to stand or fall, as an entirety. But if said exception was merely incidental, if the legislative intent was to pass a law providing a better way for cities of the first class to incorporate adjacent territory within the city limits, and the exception was without special import, for instance, an amendment ingrafted in the law, by some statesman who considered his special work life was "to down" railroads and other corporations, or by some friend of the Union Pacific Railway Company in the legislature, with a view to bringing the present suit, then the objectionable part could be disregarded without vitiating the entire law.

We have called attention to some events antecedent to the passage of the law of 1891, and of which the court may properly take judicial notice, and which we think may properly be considered as showing the why and wherefore of the passage of said law. A law somewhat similar to this had been a part of the laws of Kansas, relating to cities of the first class for years, and when the decision of the Supreme Court in Union Pacific Ry. Co. vs. Kansas City, *supra* brought out its weak points, the legislature at its next session amended

it. The law is general in its nature, and had for its purpose to afford an expeditious and effective way for a city of the first class to incorporate adjacent territory within the city limits.

Chief Justice Shaw in Warren vs. Charleston, 2 Gray, 84, quoted with approval by this court in the income tax cases, 158 U. S., 601, says the unconstitutional part of the law and the balance of a law in order to be void, must be "so mutually connected with and dependent on each other as conditions, considerations or compensations for each other as to warrant a belief that the legislature intended them as a whole and that if all could not be carried into effect, the legislature would not have passed the residue independently."

What "condition, consideration, or compensation," is there between the other parts of the law in question in this case and the clause excepting lands used for agricultural purposes when owned by railroad companies, or other corporations from other agricultural lands. The "conditions, considerations or compensations" between the different parts of a law referred to as prohibiting the sustaining of a part and rejection of the remainder is well illustrated in Sluson vs. City of Racine, 13 Wisconsin, 398, cited by plaintiffs in error in their brief. Certain farming lands were attached to the city of Racine by act of the legislature and the con-

stitutionality of the act was under consideration. It was claimed that part might be permitted to stand and part, virtually conceded to be void by reason of being in conflict with the constitution, rejected. The court held the contrary, quoting the rule laid down by Chief Justice Shaw, cited above and explained the reason why it applied in that case. The Court said:

"The first section of the act (Chap. 83, Pr. Laws, of 1856,) provided that the tracts in question shall be annexed to the city. The second defines the new boundaries of the city, and then follows a proviso that the farming and agricultural lands annexed should be exempt from certain taxes, and should be taxed for city and ward purposes only at the rate of one-half of one per cent. There is no doubt that in many instances by the annexation of farming lands to a city, hardships are inflicted upon their owners by the increased rates of taxation to which they are subjected. If they are annexed, they must be taxed as other lands in the city, and that is a matter proper to be considered by the legislature in determining whether they shall be annexed. In this act it is evident the legislature had it under consideration, and that they annexed these lands with the idea that they might protect them against such hardships by a proviso for a less rate of taxation. The proviso was clearly intended as a compensation for the annexation and stronger language could not be well selected to show that the legislature intended the one to be subject to the condition stated in the other,

and that they would not have annexed these lands unless they had supposed that effect could be given to the proviso. For these reasons we think the principle stated applies, and the act should be held inoperative."

The connection between the good and bad parts of the law in this Wisconsin case, is very apparent, but we fail to see any similar relationship between the parts of the act under consideration, and certainly the plaintiffs in error have failed to show any.

Mr. Cooley in his work on Constitutional Limitations, page 210, says:

"A statute, it has been said, is judicially held to be unconstitutional, because it is not within the scope of legislative authority; it may either propose to accomplish some lawful, and even laudable object, by means repugnant to the Constitution of the United States or of the state. A statute may contain some such provisions, and yet the same act, having received the sanction of all branches of the legislature, and being in the form of law, may contain other useful and salutary provisions, not obnoxious to any just constitutional exception. It would be inconsistent with all just principles of constitutional law to adjudge these enactments void because they are associated in the same act, but not connected with or dependent on others which are unconstitutional. Where therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the

provisions are connected in subject matter depending on each other, operating together for the same purpose, or otherwise so connected together in meaning, that it cannot be presumed the legislature would have passed the one without the other. *The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last may fall. The point is not whether they are contained in the same section; for the distributions into sections is purely artificial; but whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordauce with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained.*"

Supposing the clause in the Statute, under consideration, excepting lands used for agricultural purposes owned by any railroad or other corporation from the general class of lands, so used, and not subject to be taken into the city, was stricken out. The law would then certainly be complete in itself and could be enforced according to the legislative intent. Lands situated with respect to a city of the first class as those ennumerated in the law, receiving all the benefits of the various departments of the city, for protection against fire, etc., maintained by it at a heavy expense, could be

incorporated within the city and be made to contribute towards the benefits which they receive, excepting in case of lands used for agricultural purposes, owned by railroads and other corporations. To that extent the legislative intent being in conflict with Federal Constitution could not be carried out. But that is but a very small portion of the act and when rejected the entire purpose of the law, can still be accomplished without the slightest hindrance by reason of the rejection of this unimportant provision.

The Supreme Court of Colorado in the case of People ex rel. Seeley vs. Hull Jr., Treasurer, 8 Colorado, 485, 9 Pacific Reporter, 34, had under consideration a law of that state entitled "An act to provide for the payment of county and road taxes in cash and to repeal all laws in conflict therewith." In the body of the law it provided:

Section 1. All property taxes levied for county purposes and for road purposes together with all penalties and costs thereon shall be payable in cash only, *provided* whenever the market value of such warrants shall be less than their par value, it shall be the duty of the county treasurer of the county to credit the cash so received, to a special fund which fund shall be used for the purpose of buying any outstanding county or road warrants respectively at the lowest price not exceeding par at which the same or any part thereof may

be offered to the county treasurer: *Provided further*, the county commissioners may by resolution set aside not to exceed twenty-five per cent of the money so collected for the purpose of creating a special contingent fund. *Provided further*, that said sum shall not be used for the payment of any outstanding warrants, or for the payment of any salaries or fees of officers or for any purpose whatever except in payment of purchases of supplies for county purposes hereafter made, etc.

This law or all the provisos were claimed to be unconstitutional because they were repugnant to the provision of the constitution of the state requiring the title of a law to state the purpose of the act. The Court in sustaining this contention says:

"The specific objection to which our attention is directed under the first question above stated, is that the portion of the act designated therein relates to a subject in no way mentioned or coveyed by the title, and, therefore, that it is in conflict with Section 21, Art. 5, of the constitution. Other exceptions are taken to the provisions in question, but, inasmuch as we deem this one decisive, they will not be discussed. The title of the act is as follows: "An act to provide for the payment of county and road taxes in cash, and to repeal all laws in conflict therewith." The first three lines of section 1, declares that "all property taxes levied for county purposes and for road purposes, together with all penalties and costs thereon, shall be payable in cash only." The third and last section specifically repeals two ex-

isting provisions which authorized the payment of such taxes in county warrants, and then concludes with the usual general clause repealing inconsistent acts and parts of acts.

The foregoing are the only portions of the statute which can possibly be considered as covered by the title. The remainder thereof treats of subjects wholly disconnected from that of the payment of county and road taxes in cash. No learning or ingenuity can satisfactorily demonstrate that clauses providing for the disbursement of funds in the treasury are embraced within a title which is expressly confined to the COLLECTION of such funds. It requires no argument to show that provisions relating to the purchase of outstanding warrants at their market value, setting aside for a special purpose 25 per cent. of funds in the treasury, advertising for sealed propositions of sale from the holders of the warrants, canvassing such bids by the county commissioners, and the like, are not germane to the subject mentioned. This conclusion, however, does not necessarily render void the portion of section 1 above quoted. It and the repealing clauses are clearly, as already observed, within the purpose expressed in the title. They do not in any way depend upon the other parts of the act, and are complete in and of themselves. In view of the latter part of the constitutional provision referred to, as well as under a familiar rule of statutory construction, it is our duty to hold that while all the provisos of section 1 and all of section 2 are void, the remainder of the act is perfectly valid."

In the case of Lowndes County vs. Hunter, 49 Ala., 507-509, *supra*, it was virtually conceded by the court that the provision of the law under consideration to the effect that the county could recover from the former clerk and his bondsmen the amount said county was compelled to pay for completing the records which said former clerk had left unfinished, was unconstitutional, but notwithstanding this fact the remaining parts of the law were held good and were enforced. It could have been contended with great plausibility that the legislature would not have passed a law imposing the burden upon the county for doing the work that former clerks should have done, unless the amount could have been recovered from the delinquent clerks and their bondsmen. The Court says:

"The rule is that if some of the provisions of a statute are violative of the constitution, while others are consintent with it, the latter will be maintained if they can be separated from and stand without the unconstitutional parts of the law. The Courts will treat the unconstitutional parts as if they were stricken out of the statute. Mobile & Ohio R. R. Company vs. State, 29 Ala. 373; *ex parte* Pollard, 40 Ala. 77. In the application of this rule it is not material that the constitutional and unconstitutional provisions are mingled in the same section as they are said to be in this statute. The division of statutes into sections is purely artificial; and one section may and often does

contain provisions distinct and separate. The inquiry is, not as to location of the several provisions, but whether they are so essentially and inseparably connected, that if the unconstitutional provision is stricken out, that which remains is not complete in itself and capable of operation according to the legislative intent. Cooly's Con. Lima. 177-9, Mayor and Council vs. Dechest, 39 Md. 369.

In the case of Turner vs. Commissioners of Woodson County, 27 Kansas, 314-317. A section of a statute authorizing the voting of bonds in aid of railroads was declared unconstitutional and it was contended that the entire law thereby should fall. The section declared invalid provided for setting aside the tax collection from any railroad to which a township had voted bonds for the use and benefit of that township. The Court while acknowledging the unconstitutionality of the section complained of, yet held the remaining portions of the law were valid and binding. Mr. Justice Brewer, then Associate Justice of the Supreme Court of Kansas, disposes of the claim in a very few words:

"Neither do we see any force in the last objection. It can not be seriously contended that the invalidity of this section renders the balance void. That is perfect and complete by itself, and does not depend at all upon

the objectional portion of this section. (Cooley's Const. Lim. 177 to 181.")

The connection between the two parts of the law in the 27th Kansas case were much nearer than can possibly be in the case at bar. In the former case a law which authorizes the electors of a township to vote bonds and thereby place on themselves an onerous burden, as a sort of compensation, gave to such township the taxes collected from said road in the township. And it could be argued with force that this would be an inducement to favorable action by the voters when deciding whether to place this burden on themselves, but in the case at bar nothing of that kind exists.

The case of State ex rel. Monnett, Attorney General vs. Baker, Ohio 44, N. E. Rept., 516, is similar to the case at bar in that the objectional part of the law was an exception. The legislature passed a law creating a class of cities for the purpose of municipal government. It included all cities, which according to the federal census of 1890 or any subsequent Federal census shall have a population of not less than 27,000 or more than 34,000 EXCEPTING CITIES OF THE SECOND CLASS, THIRD GRADE "a." The class of cities second class, third grade "a" had been created by a previous enactment

and included cities having a population of more than 28,000 and less than 33,000. This exception was held by the Supreme Court of Ohio to be unconstitutional, but said Court refused to declare the entire law invalid, by reason thereof. The Court says:

"Hence the question in this case resolves itself into this, whether the exception of third grade "a," invalidates what, under the previous decisions of this court, would otherwise be a valid classification of cities for the purpose of organization and government. We think not. Third grade "a" was formed by an act adopted March 5, 1891, (88 Ohio Laws, 77), and included all cities having a population of more than 28,000 and less than 33,000 inhabitants on the first day of July, 1890, as ascertained by the last Federal census, so that cities of this grade would be included in the class in question. Now, if it was not competent to the legislature to make this exception to the class formed April 20, 1893, then it is no exception, and the class then formed will include all cities in the state within the limits of the population named; for it was entirely competent for the legislature to make a class that would include all the cities of the state having a population of not less than 27,000 and not more than 34,000 inhabitants. Now can we infer that, if the legislature had known that the exception could not be made, the act without the exception would not have been adopted? We should rather infer that, in the judgment of the legislature, there was a necessity for such a class,

superior to its creation with an exception of the third grade "a," and it made the exception in a mistaken apprehension as to its powers."

In the case of The State ex rel. Cornish vs. Tuttle, 53 Wis., 45-50, the legislature had incorporated in the charter of the village of Whitewater, Wisconsin, a provision requiring a person who was otherwise a qualified voter to have resided in such village twenty days before an election to be entitled to vote at such elections. This provision of the charter was held to be unconstitutional and it was then claimed that the entire charter must fall by reason of this provision having been declared void. The Court in declining to adopt this view says:

"But because the charter of the village of Whitewater contains this void provision, it by no means follows that the whole act of incorporation is void. Strike out the void part, and the charter still contains valid provisions amply sufficient to enable the municipality fully to perform all of its functions. The rule in such a case, frequently asserted by this Court, is that unless the void part was compensation for or inducement to the valid portions, so that the whole act, taken together, warrants the belief that the legislature would not have enacted the valid portions alone, such portions will be operative. Slauson vs. Racine, 13 Wis., 398; State ex rel Walsh vs. Dousman, 28 Wis., 541;

Dells v. Kennedy, 49 Wis., 555. See also cases cited in the brief of counsel for defendant. Municipal corporations constituted a most important feature in our system of government. By them and through them the local and prudential public affairs of large communities are administered. They are the agencies of local self-government, easily reached and influenced by the people for the general good. So important were these corporations regarded by the framers of the constitution that they inserted in that instrument an express mandate to the legislature to "provide for the organization of cities and incorporated villages." Article XI, Sec. 3. Since the adoption of the constitution, the legislature has, in obedience to such mandate, created numerous municipal corporations, and has enacted a general law for the incorporation of villages. While it is true that quite a number of special charters contain restrictions upon the right to vote at municipal elections, similar to that in the charter of Whitewater, yet in very many of them no such restriction is found. Neither is it found in the general law for the corporation of villages. R. S. 291, Sec. 873.

Considering that it is thus made the duty of the legislature to provide for the organization of municipal corporations, and that this duty has been performed in so many instances without inserting in the acts of incorporation the invalid restriction under consideration; and considering also that there is no apparent reason why the legislature should deem it more important to restrict the right to vote in Whitewater than many other municipalities of the state where no such restriction

has been attempted, it seems very clear to our minds that the void part of section 4 of the village charter was not the inducement to, or consideration for, the enactment of the valid portion of the charter. On the contrary, we have no doubt that the legislature would as readily enacted the valid portion of the act, had the void provision been wholly omitted therefrom."

It seems to us that the language of the Wisconsin Court is very much in point in this case. It is incredible that the legislature of the state of Kansas could have been induced to, or to the sligthest degree have been influenced in passing a law of as much importance to the cities of the first class, comprising all the larger municipal bodies in the state, as the one under consideration by the question of whether lands used for agricultural purposes owned by railroads or other corporations should be taken in or not. Without some provision of the kind embodied in the law 1891, a city would become hidebound. A person who had vacant lands living in the city or adjacent to it, and enjoying the benefits of city improvements but either because he wanted to hold his property for speculation or because it was used for some special purpose as in this case, and it was desired to escape the increased taxation and restraints of city control, could check and hamper the growth and well being of a city to an unlimited degree,

unless there was some way to take such lands within the city limits without the consent of the owners.

See also on this point Road v. McCarger, 40 Cal., 177.

Packet Co. vs. Keokuk, 95 U. S., 80.

Robinson vs. Bidwell, 22 Cal., 379.

The People vs. Kenney, 96 N. Y., 294-302.

Donnersberger vs. Pendergast, 128, Ill., 229.

Bank vs. Hines, 3 Ohio St. 35.

Santo vs. State, 2 Iowa, 164-205.

Authorities on this question could be multiplied *ad libitum* but while the principle is easily stated its application is much more difficult and to a certain extent the Court called upon to decide a case of this kind may properly take into consideration the surroundings and the purpose to be accomplished by a law as bearing on the probable intent in its passage. Under the circumstances we submit that the law in question was enacted for the purpose of faciliating the exercise of the very important right of the city to increase ite boundaries when the proper occasion arose and that the excepting of lands used for agricultural purposes owned by railroads or other corporations from the general class of lands used for agricultural purposes was the merest incident that can be disregarded and the remaining portions of the law enforced.

The petition is demurrable for the reason that it does not contain any allegation of payment or tender by the plaintiffs in error of taxes shown by the petition to be lawfully due.

The plaintiffs in error filed their petition in the Court of Common Pleas of Wyandott county, Kansas, asking that the taxes assessed by Kansas City and the school board of Kansas City against the lands of the Union Pacific Railway Company, for city and school purposes, be enjoined for the alleged reasons that the law under which such lands had been taken into the city was unconstitutional, and therefore said city and school taxes were levied without authority of law and were illegal and void. (Rec., p. 7.) They also alleged in their petition that the State Board of Railroad Assessors of Kansas, the Township of Wyandotte and School District No. 9 had levied certain taxes against the property of said Railroad Company, (pp. 11-12-13, Record,) but there is no allegation that the State or County taxes, or the taxes levied by the State Board of Railroad Assessors, Wyandott Township, or School District No. 9, had been paid or tendered, although no complaint is made as to the State and County taxes or the levies of the State Board of Rail-

road Assessors and the levies of Wyandotte Township and School District No. 9, are alleged in said petition to be correct and that said plaintiffs stand willing and ready to pay them. (Rec., p. 13.)

It is the contention of the defendants in error that plaintiffs in error could not maintain this suit and that the demurrer to their petition was rightfully sustained for three reasons. First, because there is no allegation of a tender of the taxes levied for State and County purposes. Second because there is no allegation of a tender of the taxes levied either by the defendants in error Kansas City and school board of Kansas City or the Township of Wyandotte and School District, No. 9, and third because no tender of any part of the taxes levied by the State Board of Railroad Assessors or Wyandotte Township is alleged.

First—There is no allegation or tender of the taxes levied for state or county purposes. The correctness of the assessed valuation of the property is not disputed, and no complaint is made as to the rate of taxation for state or county purposes. The petition should contain an allegation of the payment or tender of the state and county taxes, and without it is fatally defective.

Under the laws of Kansas, a person must pay all his taxes, or one-half of all of the same at one time, and

can not pay, nor can the county treasurer lawfully receive payment of any particular tax or taxes, leaving some particular tax unpaid.

In Julien vs Ainsworth, 27 Kan., 446, the plaintiff's total tax was $105.87. He disputed the validity of $19.00 of that amount levied to pay certain railroad bonds. He alleged in his petition a tender to the county treasurer of $86.87, the amount of his taxes less the railroad bond tax, and the treasurer refused to receive said amount. Mr. Justice Brewer, delivering the opinion of the Court said:

"The question presented is whether a tax-payer can at his option tender to the County Treasurer a part of the taxes assessed upon any specific property, and compel him to receive and receipt for such portion."

The law as declared in the syllabus of this case on this point is as follows:

"A taxpayer has no right to tender to a County Treasurer a portion of his taxes, and compel a receipt therefor. The treasurer may decline to receive such part tendered, or to give any receipt, unless the entire amount of the tax is paid, or the taxpayer exercises the option given by Section 91, of the tax law, of paying one-half thereof before the 20th day of December."

The proper practice and pleading in cases of this

character was pointed out by Justice Brewer in the opinion in this case at page 449. It is said:

"*If the plaintiff desires, as counsel say, to contest the validity of any particular tax or part thereof, his proper remedy is to tender the remaining taxes*, as he did in this case, and then bring his action for an injunction, keeping good his tender, and showing wherein the taxes not tendered are illegal, and no proper charge upon his property. Then if his claim of illegality is sustained, an injunction will be ordered restraining the collection of such illegal tax, and *the treasurer may then* receipt for such taxes tendered and admitted to be legal. In no other way can proper protection be secured to the officer and the public."

While the plaintiffs in error did not directly, by this action enjoin the collection of all taxes levied on the lands described in their petition *during the pendency of this case*, they did so indirectly, and as effectually as though they had sought to enjoin the state and county taxes as well as the city and township taxes.

The county treasurer is a defendant in error in this action. He represents the interest that the state and county have in the payment of the taxes due to the state and county. The state, county, and city are all affected by the failure of the plaintiffs in error to pay their taxes; are delayed in the collection of public revenues by the prosecution of this suit which involves but

a small portion of the total tax assessed against the property of the plaintiffs.

In the recent case of the Bank of Garnett vs. Ferris, 55 Kans., 120, in which case the tax levied against the bank and its stockholders was illegal because the assessors of Anderson County had discriminated against banks and their stockholders in fixing a basis of valuation for their property, the Court said:

"It is contended that a discriminating and illegal tax of this character cannot be enjoined; but in a case just decided it has been held that injunction is a proper remedy, and that a party who has tendered *all of the state taxes, and his share of the county and other local taxes, is entitled to have enjoined the collection of the illegal excess.* (C. B. & Q. Ry. Co. vs. Commissioners of Atchison Co., 54 Kans., 781.) *It does not appear that any portion of the taxes due upon the property was paid or tendered before these proceedings were instituted.*"

"No part of the *state tax* has been paid, and there is no charge that the state officers have been guilty of irregularities or wrong doing in respect to these taxes."

"If the parties had paid that portion of the tax about which there is no question, and such part of the remainder as could be readily ascertained to be a just tax upon a fair valuation, they would have been entitled to an injunction to prevent the collection of the illegal excess."

In the recent case of Franz vs. Krebs, 41 Kans., 233, which was an action to enjoin the county clerk from issuing a tax deed on a tax sale certificate on property of the plaintiff, and which certificate was claimed to be illegal, because a part of the tax, for which the property was sold, was an illegal special assessment, levied by the city of Atchison. The plaintiffs offered on the trial to make good the offer made in their petition as to the payment of the taxes conceded to be legal and due. The trial court found that the plaintiff failed to pay or tender the second half of her general taxes.

The Supreme Court of Kansas, in its opinion delivered by Chief Justice Horton, said:

"It is conceded that all taxes levied upon the real estate for which it was sold, were legal, *except the special macadam tax*. It had been frequently decided by this court that an action will not lie to set aside a tax sale certificate, *or restrain a tax proceeding*, without a prior payment or tender, of all the legal taxas admitted to be due and payable. In this case the amount of legal taxes are not in dispute, and therefore the rules applicable to other cases generally will be applied to this."

"Evidently the plaintiff was guilty of laches, in failing to pay or tender the second half of her *general taxes* admitted to be legal and due."

Second. The plaintiffs in error should have alleged a

payment or tender of either the city or township taxes levied on their property. It was taxable whether in the city or out of it. The valuation and rate of taxation was fixed and the tax due on either theory, as to the validity of the ordinance easily computed. The plaintiffs in error should have, if their property was in the city, paid taxes on it according to the rate of taxation fixed by the city authorities, if it was in Wyandotte Township, they should have paid according to the rate of taxation fixed by the township officials. They were bound to know, as a matter of law, whether or not their land was in the city or not, and to act accordingly.

The plaintiffs in error allege the taxes levied by the defendants Wyandotte Township and School District No. 9, on the land in controversy, not assessed by the Board of Railway Commissioners, are valid and that they were extended upon the tax rolls, (page 12 of Record.) and that the county treasurer "proposes to and will collect the amounts of said city and school taxes levied against said property as aforesaid."

The plaintiffs should not be allowed to escape payment of taxes for years by alleging that they do not know the location of their own lands with reference to the city limits, nor by alleging that there is a conflict between the municipal authorities as to which of them

have jurisdiction to tax such lands. This is especially true in this case where both the township and city authorities had levied a tax and an opportunity to pay, or at least to offer to pay on either basis of taxation, was presented.

The case of the Northern Pacific Railway Company vs. Clark, 153 U. S., 252, 14 S. Ct. Rep., was a suit by the Northern Pacific Railway Company to enjoin the collection of taxes alleged to be illegally assessed against its lands. The circuit court sustained a demurrer to the bill and dismissed it for want of equity. In this case the bill showed that the railway company was liable to pay taxes either on a percentage of its gross earnings or to pay a tax upon its land as other property of like character was assessed. The bill did not allege a tender of taxes on either basis of taxation. Mr. Justice Jackson, delivering an opinion of the court, said:

"Being liable to pay either a percentage on gross earnings in accordance with the provisions of the act of 1889, or a tax upon its land as other property of like character was assessed, the appellant was not entitled to any relief in a court of equity by injunction without payment or tender of what was due under one or the other of these modes of taxation."

The recent case of Albuquerque vs. Perea, 147 U. S., 87; 13 S. Ct. R., 194, is decisive as to the effect of the allegations of the plaintiff's petition by which they seek to avoid the necessity of alleging a tender of the taxes admitted to be due. This case is in principle identical with this. Mr. Justice Brewer, declaring the opinion of the court, quotes from the petition of the plaintiffs the following, which is very similar to the allegations of the petition in this case:

"That the amount of its taxes upon the assessment as made by the board of equalization is the sum of $2,189, and that the amount of the assessment which your orator should justly pay for its said property, if lawfully, equitably, and justly assessed, would be the sum $1,532.30, which said sum your orator brings into court, and hereby tenders."

"And your orator further alleges that the said assessment and said tax roll are so made out that it is impossible to separate the property upon which your orator is justly and lawfully taxed, and the taxes upon which are justly and lawfully levied, from the balance of the taxes assessed against your orator; but whatever sum may be ascertained by the court to be justly due from your orator on account of taxes for the year 1889 your orator is ready and willing to bring the same into court and is ready to pay the same."

The defendants demurred to the bill in this case, and their demurrer was sustained, and the bill dismissed,

and this decision was affirmed by the Supreme Court of the Territory of New Mexico, and from this decision an appeal was taken. In the opinion, Justice Brewer, having stated the facts of the case, among other things, said:

"With respect to the taxes of 1889, there was no payment or tender of payment of any amount. Plaintiff seeks to avoid the necessity therefor by alleging that it is impossible to separate the legal from the illegal portions of the taxes—an allegation which is manifestly untrue—in view of the fact that it had no difficulty in making the separation in the taxes of 1888, the assessment for which was made in a similar way, and in view of the further fact that it must have known what property it had which was subject to taxation as well as its value, and therefore the rate of taxation being fixed by law, it could, of course, have known what amount was undoubtedly due. The rule in respect to this matter is perfectly well settled in this court. In State Railroad Tax Cases, 92 U. S., 575, 616, it was fully considered. In that case it was said by Mr. Justice Miller, speaking for the court: 'It is a profitable thing for corporations or individuals whose taxes are very large to obtain a preliminary injunction as to all their taxes, contest the case through several years' litigation, and when in the end it is found that but a small part of the tax should be permanently enjoined, submit to pay the balance. This is not equity. It is a direct violation of the first principles of equity jurisdiction. It is not sufficient to say in the bill that

they are ready and willing to pay whatever may be found due. They must first pay what is conceded to be or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted. The state is not to be thus tied up as to that of which there is no contest, by lumping that with which is really contested. If the proper officer refuses to receive a part of the tax, it must be tendered, and tendered without the condition annexed of a receipt in full of all the taxes assessed.'"

Third. The petition shows that a portion of the lands included in the ordinance extending the city limits, was real estate owned by the Union Pacific Railway Company, and not used or necessary to be used in the daily operation of said railway, and therefore subject to assessment for taxation by the city or township authorities, and that another portion of the lands included in said ordinance was real estate assessable only by the State Board of Railway Assessors. The petition shows that the State Board of Railway Assessors assessed the lands assessable by them and included within the ordinance extending the city limits as though the same were in the Township of Wyandotte. The petition further shows (pages 10 and 11, record) that the total assessed valuation of the road bed, right of way and other property so asses-

sed by the State Board of Railway Assessors was $233,612.00, and that of this sum $110,968 was for lands included in the ordinance extending the city limits. Deducting the assessed valuation made on the lands included by the ordinance in the city limits from the total assessed valuation aforesaid there remains an assessed valuation of $122,644.00 on which there would be due to Wyandotte Township according to the rate of taxation shown by the petition $1,103.79, and to School District No. 9, $613.22, regardless of the questions involved in this case. The petition contains no allegation of payment or tender of this portion of the tax, the validity of which is admitted by the petition.

In Hagaman vs. Comm'rs of Cloud Co., 19 Kan., 394, an action to enjoin the assignment of tax sale certificates, in the opinion delivered by Chief Justice Horton, the law on this question as declared by this court is quoted and approved. It is said:

"No evidence was offered that the taxes were wholly illegal and void; neither was it alleged in the petition, nor proven on the trial, that the plaintiff had paid or tendered any part of the taxes. The defendants demurred to the evidence of the plaintiff. The court sustained the demurrer; and we are asked to reverse such ruling."

"Upon familiar principles, and by the repeated decisions of this court, the plaintiff is not rightly entitled to the relief demanded until he has done that justice, or offered to do it, which he exacts from others. He who seeks equity, must do equity. The action of the court in sustaining the demurrer was correct. (Gulf Rld. Co. v. Morris, 7 Kan., 210; Comm'rs of Leavenworth Co. v. Lang, 8 Kan., 284; City of Ottawa v. Barney, 10 Kan., 270; Challis v. Comm'rs of Atchison Co, 15 Kas., 49.) *To the suggestion of counsel for the plaintiff, that if the court found any of the taxes illegal, the judgment should have been for the plaintiff, conditioned upon his paying the legal tax, not that he had no case in court*, we cannot better reply than by using the forcible language of Mr. Justice Miller in Bailey v. A. & P. Rld. Co., C. L. J., vol. 1, 502, that, 'Whenever parties come into this court to ask this court to enjoin the collection of taxes, or the collection of part of a tax, if there is any part, which they admit to be due or just, or which the court can see in the statement made in the bill ought to be paid, there must be an allegation made in the bill conforming to the fact, that they have paid it; and it is not a sufficient allegation to come and say that, 'we have paid it into the court,' because the state is not to be stayed in its revenue, which is admitted to be due, in that way; and a party claiming that he will not pay his taxes, or any portion of them, cannot screen himself during the course of a long litigation from paying that which must be paid, and which every body sees must be paid, by setting up a contest over that which is doubtful, and which may, or may not, be necessary to be paid.'"

The law of Kansas requiring a tender of the taxes due on the plaintiff's land, the demurrer of the defendant's should properly have been sustained on that ground. The sustaining of the demurrer therefore by the state court did not necessarily involve the consideration of any question of constitutional law, the demurrer could have been sustained without passing upon the constitutionality of the act in question. This court therefore has no jurisdiction over this case.

In Eustis vs. Booles 150, U.S., 362, it was decided as follows:

"To give this court jurisdiction of a writ of error to a state court, it must appear affirmatively not only that a federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was decided adversely to the party claiming a right under the federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it."

See also the following cases as sustaining our contention that a tender of the taxes legally due must be alleged:

Insurance Company of North America vs. Bonner, 49 Pac., 366.

Ottawa vs. Borney, 10 Kans., 270.

High on Injunctions, (3d edt.) secs. 497 and 498.

2 Beach on Injunctions, sec. 1208.

2 Dillon's Municipal Corporations, (4th edt.) sec. 914 and note.

We respectfully submit in conclusion that the plaintiffs in error have failed to establish their right to prosecute this appeal, that their appeal does not present a federal question, that the federal question which they claim is involved in this litigation, they are not in a position to take advantage of, and that having failed, to do equity in paying or offering to pay the tax admitted to be due, they cannot now even if their contentions are all correct, call on a court of equity to grant them relief, and we therefore ask that this appeal either be dismissed or that the decision of the Supreme Court of Kansas be affirmed.

T. A. POLLOCK,
City Counselor,

F. D. HUTCHINGS,
City Attorney.

Attorneys for Defendants in error.

CLARK *v.* KANSAS CITY.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 268. Argued November 13, 1899. — Decided January 15, 1900.

The provision in section 1 of chapter 74 of the Laws of Kansas of 1891, authorizing certain first-class cities to take in described tracts of land in territory adjoining or touching the city limits and make them a part of the city by ordinance, and providing that "nothing in this act shall be taken or held to apply to any tract or tracts of land used for agricultural purposes, when the same is not owned by any railroad or other corporation" does not conflict with any provision of the Constitution of the United States, when exercised by such a city to take in lands belonging to a railroad company which are not used for agricultural purposes, but are occupied by the company for railroad purposes.

THIS case was here once before on writ of error to review a judgment of the Supreme Court of Kansas reversing a judgment of the *nisi prius* court, sustaining a demurrer to the petition of plaintiffs. *Clark* v. *Kansas City*, 172 U. S. 334.

The writ was dismissed on the ground that the judgment was not final. On the return of the case to the Supreme Court of the State such proceedings were had there and by its direction in the trial court that a final judgment was entered, denying the relief prayed for, which judgment the Supreme Court affirmed, and the case was then brought here.

The question presented is the constitutionality of a statute of the State and the validity of an ordinance passed by Kansas City under the statute. Kansas Laws of 1891, 133, c. 74; act of March 10, 1891. The statute is as follows:

"Cities of the First Class.

"An act relating to certain cities of the first class, and the adding thereto certain adjoining territory.

"*Be it enacted by the Legislature of the State of Kansas:* SEC. 1. That whenever any territory adjoining or touching the city limits of any city of the first class having a population of 30,000 inhabitants or more shall be subdivided into lots and blocks, or whenever any unplatted tract of land shall lie upon or mainly within any such city, or is so situated as to be bounded on three fourths of its boundary line by platted territory of or adjacent to such city, or by the boundary line of such city, or by both, the same may be added to and made a part of the city by ordinance duly passed; which ordinance shall describe the territory by giving the name of the subdivision or addition as platted, and by giving the metes and bounds of such unplatted tract, or by giving the metes and bounds of each tract and plat so taken in separately, or of the entire tract or tracts so taken in, with the section, town, range and county in which the same is located, without further proceedings; *but nothing in this act shall be taken or held to apply to any tract or tracts of land used for agricultural purposes when the same is not owned by any railroad or other corporation.*"

* * * * *

The following is the ordinance:

"Ordinance No. 2163.

"An ordinance adding certain lands therein described, known as the Union Pacific lands, to and making the same a part of the city of Kansas City, Kansas.

"Whereas, A certain unplatted territory belonging to the Union Pacific Railroad Company lies upon and mainly within the city of Kansas City, Kansas, and is so situated as to be bounded on three-fourths (¾) its boundary line by platted territory of, and adjoining to said city; which said railroad land, by virtue of its location, enjoys the benefits of said city without sharing its burdens: Now, therefore,

"*Be it ordained by the Mayor and Councilmen of the City of Kansas City, Kansas:* SEC. 1. That the following described territory, to wit: . . . Said tracts being contiguous and containing in the aggregate one hundred and seventy-two (172) acres, be and hereby is added to and made a part of the city of Kansas City, Kansas.

"SEC. 2. This ordinance shall take effect and be in force from and after its passage and publication in the Kansas City Gazette."

After passage of the ordinance the city levied taxes on the lands, and this suit was brought to restrain their collection. The petition presented the facts, and contained the following allegations:

"Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction equal protection of the laws.

"And plaintiffs are advised and so charge the fact to be that in so far as said statute attempts to authorize the taking of said lands within the limits of Kansas City, Kansas, as attempted in said ordinance, Exhibit 'A,' it is unconstitutional, null and void, in this, to wit:

"That by reason of that portion of the act which excepts from its operation any tract or tracts of land used for agricultural purposes, when the same is not owned by any railroad or other corporation, it is in violation of that part of the Fourteenth Amendment to the Constitution of the United

States, which reads as follows: 'Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction equal protection of the laws.'

"Plaintiffs further allege upon information and belief that there was not at the time of the passage of said chapter 74 of the Session Laws of Kansas for 1891 any city of thirty thousand (30,000) inhabitants or more in the State of Kansas where the conditions referred to in the first part of the said act permitting the adding of additional territory to a city by the passage of an ordinance merely existed; and plaintiffs are advised, and so charge the fact to be, that said act of the legislature, while purporting to be a general act, was intended solely to apply to the lands attempted to be taken within the limits of said Kansas City, Kansas, by said ordinance, 'Exhibit A.'"

The property over which the extension was made was actually used in part for railroad purposes, and consisted of road bed and right of way, main and side tracks, buildings and improvements. The portions not actually used for railroad purposes, the petition alleged, were vacant and unoccupied lands, which were held and possessed by the railroad company for railroad purposes.

Mr. N. H. Loomis for plaintiffs in error. *Mr. Winslow S. Pierce* and *Mr. A. L. Williams* were on his brief.

Mr. T. A. Pollock and *Mr. F. D. Hutchings* for defendants in error.

Mr. Justice McKenna, after making the above statement, delivered the opinion of the court.

The statute excepts from its operation lands used for agricultural purposes if owned by individuals. It includes such lands if owned by corporations. It is hence contended by plaintiff in error that the statute discriminates between the owners of agricultural lands, and between them again and the

owners of all other lands, and infringes thereby the provisions of the Constitution of the United States which guarantees to all persons the equal protection of the laws.

Of the discrimination between owners of agricultural lands the Supreme Court of Kansas said the defendants in error [plaintiffs here] cannot be heard to complain. "Their lands are not agricultural lands; at least, they do not allege them to be such lands, but, on the contrary, allege that parts of them are used for railroad purposes, and that the remaining portions are vacant and unoccupied lands, held and possessed for railroad purposes. Owning no agricultural land, the defendants in error are not affected by the discrimination which the statute makes between the different classes of owners of such kind of land, and they cannot therefore be heard to complain on that score. 'A court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect and who has therefore no interest in defeating it.' Cooley's Constitutional Limitations, 6th ed., 196." *Supervisors* v. *Stanley*, 105 U. S. 305.

We concur in this view, and it would be difficult to add anything to its expression. The discrimination occurs only in a particular use of the lands, and it would seem obvious that such use must be shown to make a cause of action — a right infringed and to be redressed. If the lands of the plaintiff belonged to an individual they would be subject to the statute. Where, then, is the discrimination? In that, it is claimed, if the lands were used for agriculture, being owned by a corporation, they would be subject to the statute, but would not be if owned by an individual. But that is not a discrimination immediate and actual against plaintiff in error. It does not now, and there is nothing in the record to show that it ever will exist. Not a law alone, but a law and its incidence are necessary to a justiciable right or injury; and it therefore follows if plaintiff has a grievance under the statute which this court can redress, it comes from the discrimination between agricultural lands and other lands — a cause of action, not because the plaintiff is a corporation, but because it is an owner of such lands, and one which it would have even if it were an individual.

The answer to that charge depends upon the power of the State to classify objects of legislation; necessarily a broad power, and one which this court has so many times decided exists, and so many times has defined and illustrated the limits upon it of the provision of the Constitution of the United States invoked by plaintiff in error, that farther definition would seem impossible, and any new instance of its application not without exact or analogous example in some decided case.

The reasoning of the cases we need not repeat. It is enough to say that the rule of the Constitution leaves to the discretion and wisdom of the State a wide latitude as far as interference by this court is concerned. It is not a substitute for municipal law; it does not invest power in this court to correct the impolicy and injustice of state laws, and the equality it prescribes is not for persons merely as such, but according to their relations. "In some circumstances it may not tax A more than B, but if A be of a different trade or profession than B, it may. And it matters not of taxation if A be a different kind of corporation than B it may subject A to a different rule of responsibility to servants than B, *Missouri Pacific Railway* v. *Mackey*, 127 U. S. 205; to a different measure of damages than B, *Minneapolis & St. Louis Railway* v. *Beckwith*, 129 U. S. 26; and it permits special legislation in all its varieties. *Missouri Pacific Railway* v. *Mackey*, 127 U. S. 205; *Minneapolis & St. Louis Railway* v. *Herrick*, 127 U. S. 210; *Duncan* v. *Missouri*, 152 U. S. 377." *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283.

And these principles have been affirmed in later cases, and a classification based on the difference between fire insurance and other insurance has been sustained; also on a difference between railroad and other corporations and of persons. *Orient Insurance Co.* v. *Daggs*, 172 U. S. 557; *Tullis* v. *Lake Erie & Western Railroad*, 175 U. S. 348, decided at the present term.

In *Atchison, Topeka &c. Railroad* v. *Matthews*, 174 U. S. 96, the majority of the court decided that in consequence of the great peril and possibility of fires being communicated by

the locomotives of railroad corporations, it was in the power of the State of Kansas to impose on them, in a suit successful against them, an attorney's fee, and not impose it on an unsuccessful plaintiff. It was said by Mr. Justice Brewer, after a review of the cases that —

"It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public. Thus, when the legislature imposes on railroad corporations a double liability for stock killed by passing trains, it says, in effect, that if suit be brought against a railroad company for stock killed by one of its trains it must enter into the courts under conditions different from those resting on ordinary suitors. If it is beaten in the suit it must pay not only the damage which it has done, but twice that amount. If it succeeds it recovers nothing. On the other hand, if it should sue an individual for destruction of its live stock it could under no circumstances recover any more than the value of that stock. So that it may be said in matter of liability, in case of litigation, it is not placed on an equality with other corporations and individuals; yet this court has unanimously said that this differentiation of liability, this inequality of right in the courts, is of no significance upon the question of constitutionality. Indeed, the very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality." 174 U. S. 106.

In the case at bar the distinction is between tracts of agricultural lands in a certain relation to cities and lands used for other purposes in such relation.

We think the distinction is justified by the principle of the cases we have cited. That principle leaves to the State the adaptation of its laws to its conditions. The growth of cities is inevitable, and in providing for their expansion it may be the judgment of an agricultural State that they should find a limit in the lands actually used for agriculture. Such use it could be taken for granted would be only temporary. Other uses, certainly those to which the plaintiff puts its lands, can receive all the benefits of the growth of a city and not be

moved to submit to the burdens. Besides, such uses or manufacturing uses adjacent to a city may, for its order and health, need control. Affecting it differently from what farming uses do may justify if not require their inclusion within the municipal jurisdiction.

We think, therefore, that within the latitude which local government must be allowed the distinction is not arbitrary, and infringes no provision of the Constitution of the United States.

Judgment affirmed.